



## Corruption in Investment Projects \*

### Summary

**\* Please note that this summary of the panel was AI-generated and therefore has not been fully vetted for accuracy.**

The session from Washington Arbitration Week focused on the topic of corruption in investment arbitration, highlighting the standard of proof and its implications. The event featured a panel of distinguished experts, including Rainbow Willard, who introduced the discussion, and panelists Colleen Malala, Gladys M. B. M. M. T., Pedro Soto, and Athena Fouchard Papa.

Colleen Malala provided an update on recent developments regarding corruption claims in investment arbitration, emphasizing two main issues: the standard of proof for corruption allegations and the concept of French exceptionalism in judicial reviews. She outlined two schools of thought regarding the standard of proof: one advocating for a similar standard as other claims, and the other suggesting a heightened standard due to the serious implications of corruption allegations.

Gladys M. B. M. M. T. discussed the complexities of public policy in investment treaty claims, particularly the jurisdictional implications of alleged corrupt acts. He noted that the nature of corruption often complicates the relationship between investors and host states, emphasizing the need for clarity on jurisdiction and admissibility.

Pedro Soto contributed insights from a cross-practice perspective, comparing the tools available in criminal investigations to those in arbitration. He highlighted the challenges of proving corruption when state actions are involved, especially when parallel investigations may deter states from pursuing evidence that could undermine their arbitration stance. He also pointed out the difficulties in gathering evidence in corruption cases, particularly when third parties are involved.

Athena Fouchard Papa emphasized the importance of arbitrators being aware of evolving standards regarding corruption and the necessity of investigating potential red flags. She discussed the dual approaches of inquisitorial and adversarial systems in arbitration, suggesting that arbitrators should actively engage in the investigation of corruption claims.

The panel concluded with a discussion on the lack of a universally accepted definition of



corruption in international arbitration and the varying interpretations based on different jurisdictions. The session underscored the intricate interplay between legal standards, public policy, and the practical realities of corruption in investment arbitration, leaving many questions open for continued exploration in future discussions.

### Authors

Xstrategy

### Topics

politic

### Category

WAW

### Full Transcript

00:00:17

Welcome. This is World arbitration

00:00:22

update. This is our third

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day of a Six-Day experience

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and during the first two

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days, we had an emphasis

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in the Americas. And we

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had the eight. We actually

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had eight panels stations in



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person from Mexico City and

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today is Africa day and

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we are addressing various topics.

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And today's panel a war

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or the panel. Now, it's

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called corruption in investment products.

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The standard of proof and

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the consequences for investment arbitration.

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As one of the features

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of a world of attrition

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update, we follow the schedule

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of the region that were

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focusing on. So for those



00:01:11  
of you who are in

00:01:13  
the US are session started

00:01:16  
at 7 a.m. Because we're

00:01:18  
following Africa, schedule. Not being

00:01:21  
said, it is my pleasure

00:01:23  
to introduce rainbow Willard, who

00:01:26  
is counsel an arbitrator, and

00:01:30  
who has that for more

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than 10 years at work

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on complex, International commercial, and

00:01:38  
investment, treaty arbitrations under all

00:01:40  
of the major International rules,

00:01:42  
including the ICC on to



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draw it. Exit, at cetera,

00:01:46

rainbow has particular experience in

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energy oil, and gas and

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Mining dispute involving parties from

00:01:53

Latin America, South Asia, Europe,

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and the Middle East. Prior

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to forming her own practice,

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rainbow with counsel, at leading

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international. District, Boutique at Chaifetz

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Lindsay in York and was

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a senior associate in the

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international arbitration group of Allen

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& overy. Practicing in London



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and New York at both

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firms. Rainbow LED team in

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significant International commercial disputes and

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represented States and investors in

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case has governed by investment

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treaties or trade agreements, Rainbow

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Dash, Rainbow has extensive oral

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and written advocacy experience in

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English and Spanish and is

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equally comfortable at arbitrator and

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Council in both languages. So

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I could say way way

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more, but I don't think



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that she will, she would

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appreciate it. So rainbow you

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have to store it and

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it's a pleasure to have

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each one of you here.

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So, welcome to Wildwood out.

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Thank you so much. Jose,

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Antonio and thank you, Ian.

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Also, I'm so pleased to

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be able to take this

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virtual trip around the world

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with the world arbitration update

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and we're very grateful to



00:03:03  
the organizers. For what is

00:03:05  
a really great initiative and

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for inviting me and all

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of these Stellar panelist to

00:03:11  
be a part of We

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have a group of really

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incredible practitioners and experts here

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today, who put a lot

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of work into preparing. But

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I think is going to

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be an extremely engaging and

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informative panel and I'm going

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to introduce them. I'm going



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to go by first name,

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alphabetical order just to mix

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things up a bit. So

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first, we have Athena fouchard.

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Papa, who is an arbitrator

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based in Paris. She has

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significant experience in arbitrations involving

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States and state entities, as

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well as an arbitration with

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a link to the African

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continent before, establishing her own

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practice. Last year, Athena worked

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an international arbitration Departments of



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Major law firms for more

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than 15 years. She is

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a member of the ICC

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arbitration commission and a founding

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member of Africa, carb Athena

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is a Greek national and

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she handles arbitrations in English.

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French, and Greek. Next, we

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have Colleen Malala. Who is

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a partner at Chavis Lindsay

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LLP in New York, where

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she represents clients in international

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commercial arbitration and an investment



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disputes telling counsels clients and

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an array of multi jurisdictional

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disputes that spanned the globe

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and concern, such sectors, as

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oil and gas. Mining consumer

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goods and Telecommunications Cullen has

00:04:34  
acted as counsel in arbitration

00:04:35  
is conducted in English and

00:04:37  
French and administered by all

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major arbitral institutions Helene serves

00:04:42  
as vice-chair of the steering

00:04:44  
committee of the ICC Commission

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on arbitration and a tiara.



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And she is the steering

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committee liaison to the ICC

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task force on addressing corruption

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issues. Killeen also serves as

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co-chair of the IV a

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investment arbitration subcommittee and is

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a member of the IBA

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arbitration committee has passports on

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privilege tell. He was recently

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awarded the 12th annual Schmitt,

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lowenfeld prize for an article,

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she published along with Jessica,

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be some croston on the



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illegality of Action and investor-state

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arbitration. So she is an

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expert. Not just on corruption

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and investment arbitration. But on

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the illegal act ugly gallatry

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objection, writ large. And the

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many reasons that it can

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be asserted next coming from

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London, I believe you're in

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London today. Glad is that

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right? Okay, don't have a

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good lad, you're still yourself

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who is a partner and



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Alan and ovaries, International arbitration

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group and a member of

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the ICC International Court of

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arbitration and the ICC Africa

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commission. He was also appointed

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to the exit panel of

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conciliators by the federal republic

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of Somalia. Glad has significant

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experience, representing companies, governments and

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international organizations and institutional, and

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ad hoc arbitral proceedings, including

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arbitrations under the ICC Ica,

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exit and unseat real rules.



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And finally, last but not

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least, we have Pedro Soto,

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who is of counsel here

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in Washington DC at Gibson,

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Dunn & Crutcher, Pedro is

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a member of the white-collar

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criminal defense and investigations group

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and his practice focuses on

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anti-corruption cases, brought by us

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authorities and other enforcement agencies

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around the world. He has

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experience and anti-corruption matters and

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more than two Two dozen



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countries with a particular focus

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on Latin America. Pedro also

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has acted as counsel to

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States and private claimants and

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more than 10 arbitrations under

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the exit to exit additional

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facility and the ICC rules.

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Finally, I know that we

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had published that David Koch

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Vani who is counsel, at

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Levi Kaufman, polar and Geneva

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was going to join us

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today. Unfortunately he got a



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last-minute personal issue that made

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his participation and impossible and

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we're very sorry that he's

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unable to be here today.

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Now, for those of you

00:07:05  
who have never joined a

00:07:06  
world, arbitration update session before,

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I'm going to tell you

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a little bit about the

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structure before we get started.

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First we're going to hear

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from Colleen. Who's going to

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give us an update on



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the key developments from tribunal's

00:07:18  
and courts on the issue

00:07:19  
of corruption and investment arbitration

00:07:21  
over the last year. After

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that, each of our panelists

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is going to address specific

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legal, and practical topics that

00:07:28  
have arisen, when corruption claims

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are asserted and investment arbitration,

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and there will then be

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some discussion on each of

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these points with Arco panelist.

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Everyone who's attending. We are



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so happy. You are here

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today and we are here

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really for you so you

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are welcome to submit questions

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throughout the session in the

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chat and we will save

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time at the end to

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address your questions. If we

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don't have time to address,

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every question that we receive

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in the chat, there will

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be a breakout session at

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the end with networking, and



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you will have the opportunity

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to meet and ask questions

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of at least one of

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the panelists and your breakout

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room. So, without further ado,

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I would like to turn

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it over to Colleen to

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give us some updates on

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what's been going on in

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the world of corruption and

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investment arbitration over the last

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year. Thank you, rainbow, for

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your warm. Welcome. Thank you



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again until 10 Tony other

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organizers for inviting me to

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join you. Today, I'm very

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much looking forward to our

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panel discussion and your questions.

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So, as rainbow said, my

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task today is to give

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you an update on corruption

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related, developments and investment arbitration

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in the past year and

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to do so in age

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of 10 minutes, so I

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will focus. My remarks on



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two main issues on the

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first is the standard of

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proof of corruption. And the

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second is French exceptionalism. So,

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starting with the standard of

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proof of corruption there, two

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schools of thought in that

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regard first, is that the

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same standard of proof that

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applies to all other claims

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should also apply to corruption.

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And the second school of

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thought is that there should



00:09:04  
be a height and standard.

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And if we look back

00:09:06  
at the case in the

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past year, we have examples

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of each one. So, let's

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start with the school of

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thought that says, that there

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should be the same standard

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of proof of corruption as

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there is for other claims

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and the basis for that.

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For that position, is that

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corruption is very hard to



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prove and by its very

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nature. And so it would

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be unfair to impose on

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a party. A hiding burden

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of proof and having a

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standard person to me to

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meet at 2 to make

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out corruption. And this sound

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proof takes his formulation. Sometimes

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it's talked about as the

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balance of probabilities, reasonable certainty,

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personal conviction preponderance of the

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evidence are various ways to



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say the same thing, but

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essentially, it's that it's more

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likely than The crash happened

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and that is sort of

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the same standard of proof

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to prove other claims and

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we see this and any

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case which technically is not

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a treaty case but it

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is it does involve estate

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and there's an exit arbitration

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and I think it's it's

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quite helpful to illustrate this



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point. In that case, the

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claimants had argued that their

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Mining rights had been revoked

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unlawfully because they refused to

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participate in a bribe and

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they were supposed to make

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a bribe payments. And in

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fact, he argued that these

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rights were precisely because there

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was overwhelming evidence that the

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Mining rights were obtained through

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corruption and bribery of public

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officials including the president's, the



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then, president fourth wife, The

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tribunal concluded that the claims

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were inadmissible because of corruption

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and his meddling in the

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acquisition of the claimants Mining

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rights and getting. So here

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are a few take away

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from that case. First, the

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tribunal look to international law

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and the practice of international

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tribunals to determine the applicable

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standard of proof. Second, it

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recognized that there are two



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schools of thought. And then

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before it actually done rejected,

00:11:04

the height and standard of

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proof for corruption, allegations precisely,

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because corruption itself is difficult

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to prove, I'd reasonable certainty

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and personal conviction and looks

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and also stated that corruption

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can be proven by circumstantial

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evidence or red flags, interesting.

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Tidbits, the tribunal dealt with

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this as an objection to

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admissibility without discussion. Actually, which



00:11:31  
is interesting since typically corruption

00:11:34  
in the making of the

00:11:34  
investment is usually treated as

00:11:37  
a jurist. No question. And

00:11:38  
I think that is probably

00:11:39  
going to dress up in

00:11:40  
a bit. So I won't,

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I won't say much more

00:11:42  
than that at this point.

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So that's the first rule

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of thoughts of thought, height

00:11:48  
and standard. And the idea

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behind. Is, there's a due



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to the gravity of the

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charge and the gravity of

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the consequences basically, the clan

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gets gets dismissed, there should

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be a height and standard

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of proof. And oftentimes tribunal

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to adopt this philosophy of

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this approach will quote, judge

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Higgins, separate opinion in the

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oil platforms, that case, where

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she said that the grave

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of the charge, the more

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confidence must there be in



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the evidence for light on.

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So it's this idea that's

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because it's so such a

00:12:18  
such a grave accusation with

00:12:21  
very serious consequences. It should

00:12:24  
be demonstrated to a height

00:12:25  
and standard. There is again.

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Also there is formulations from

00:12:28  
tribunals, you'll hear clear and

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convincing evidence to the most

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rigorous level of proof of

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high threshold need for solid

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and persuasive. These are different



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ways of saying. The same

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thing in terms of it

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requires a height and standard

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and one of the cases

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where there were allegations that

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LOL have procured and you

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benefits by bribing, the van

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Croatian Prime Minister, incidentally was

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subsequently convicted on charges for

00:13:02

accepting bribes. The corruption allegation

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was rejected and hear interesting

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to BSG resources before the

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tribunal didn't acknowledge that. There



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were two schools of thoughts

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with respect to the standard

00:13:18  
of proof. Instead, it refer

00:13:21  
to the cases that adopted

00:13:23  
a high level of proof

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and then characterize this standard

00:13:27  
as having quote wide-ranging, unanimity

00:13:29  
of approach. So it, it

00:13:32  
seemed to think that you

00:13:33  
would always apply a higher

00:13:35  
height and standard to corruption

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Allegations. And then and the

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way that a phrase, it



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was like, Russia must be

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established quote to an appreciably

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higher standard than a mere

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balance of probabilities. One interesting

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tidbit about that case, in

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addition goes beyond the Senate

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approve. It also how to

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prove it and the tribunal

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said that it would rely

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primarily on for the provable

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fact that it was open

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to resorting to inferences to

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fill any evidentiary jobs only



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if the Gap was unavoidable

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and the inference was compelling.

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So, again, kind of reiterates,

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this height and standard that

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we want to be able

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to prove corruption to the

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extent. We can't, we'll do

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inferences but only if we

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have to and only if

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the inference is compelling another

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point, that the tribunal was

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very keen on, was a

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causal link between the corrupt



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activities and the contractual agreements

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that issue. So it's not

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enough that there's evidence of

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some kind of bribery. It

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also needs to have been

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to have in Juice the

00:14:38  
outcome of getting the contract.

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So there has to be

00:14:41  
a link from the corrupt

00:14:42  
act to the agreement. A

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tissue So she takeaways from

00:14:47  
these cases. For the past

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year, I would say they're



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21 is the applicable standard

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of proof of corruption remains

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an open issue despite what

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the tribunal seem to say.

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And I think it's, it's

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still open, whether it's a

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regular standard of proof for

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the standard. And then the

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second point would be that

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the tribunals will look at

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circumstantial evidence and red flags

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when there is no direct

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evidence of corruption. But they'll



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insist on this causal link

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between the crop top and

00:15:20  
the contracts that issue. So

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that was my first point.

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Second point is, I'm running

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out of time, French exceptionalism.

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And this is in the

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context of Court, decisions on

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corruption and set aside proceeding,

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I will, I know we're

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going to Tina's going to

00:15:36  
touch on this at the

00:15:36  
end. So, I'm just going



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to put down a marker

00:15:38  
for now, and just give

00:15:41  
you the highlights on the

00:15:42  
key. Takeaways, the cases are

00:15:44  
referring to here are mainly,

00:15:46  
Bella. Congress is Kyrgyzstan Central

00:15:48  
vs? Gabon and score like

00:15:50  
versus Libya, and which are

00:15:52  
all set aside cases. I

00:15:54  
also drop a footnote to

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abl versus alstom that Saga,

00:15:57  
which there was a recent

00:15:59  
about much and 1/8 in



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March of this year, but

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that was in the important

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contacts. But I think bottom

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line is, the underlying premise,

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is that a French court

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has to assess the effect

00:16:11

that upholding or enforcing in

00:16:13

the ward may have on

00:16:14

the French public order and

00:16:15

international public policy. And if

00:16:18

we, if it would be

00:16:18

contrary to French public policy

00:16:20

than the award should not



00:16:21

be upheld or For static

00:16:23

equilibrium. And so given this

00:16:27

directive the French judge, it

00:16:29

needs of the French touch

00:16:30

can do the following, it

00:16:32

can make its own his

00:16:34

or her own, this assessment

00:16:35

of the correction evidence that

00:16:36

was presented to the tribunal

00:16:37

the front stretch can reach

00:16:40

different conclusions from the tribunal.

00:16:41

So it's a de novo

00:16:42

review of the corruption evidence



00:16:45  
that was presented in the

00:16:45  
arbitration and Beyond. Actually, the

00:16:49  
French touch. Can also consider

00:16:51  
poster board evidence and making

00:16:53  
his or her assessment. So

00:16:54  
I've been as I was

00:16:55  
never presented to the tribunal

00:16:56  
so that's a, I'll leave

00:16:59  
it at that. I'll just

00:17:00  
add one foot notes about

00:17:01  
the court of cassation confirming.

00:17:03  
That the applicable standard is,

00:17:05  
the evidence has to be



00:17:07

serious precise and consistent for

00:17:10

corruption to be found. And

00:17:11

I'll stop there and leave

00:17:13

you hanging, so we can

00:17:14

resume the conversation. When is

00:17:16

he not text? Mike, thank

00:17:17

you very much. Thank you

00:17:20

so much, Killeen for meeting

00:17:22

and exceeding. What seems like

00:17:24

it was going to be

00:17:25

an impossible challenge of giving

00:17:27

us a very informative and

00:17:30

comprehensive update of what has



00:17:32

gone on over the past

00:17:33

year. It seems like tribunal's

00:17:35

have really struggled with what

00:17:37

to do with corruption claims

00:17:38

in this context and then

00:17:40

boards have struggled with how

00:17:42

to address what you're doing.

00:17:44

And to give us some

00:17:46

more information about some of

00:17:47

the legal aspects of corruption

00:17:49

claims that tribunal is have

00:17:51

struggled with and have addressed.

00:17:53

We're going to go to



00:17:54

Google and so glad, I'll

00:17:55

turn it over to you.

00:17:57

Thank you very much rainbow

00:17:58

and thank you very much

00:18:00

is 2 to the organized

00:18:02

as well and truly a

00:18:03

pleasure to be here with

00:18:04

my co panelist just by

00:18:06

way of overview, I'm corruption.

00:18:09

All this is explained raises

00:18:11

complex issues of public policy

00:18:14

and specific in the context

00:18:16

of investment treaty claims jurisdiction.



00:18:18

Admissibility not the least. Because

00:18:20

by definition, an additional Nexus

00:18:22

between the investor in the

00:18:23

state. Name of the state's

00:18:25

participation is implicit in the

00:18:27

very nature of corruption. So,

00:18:28

generally the focus and investment

00:18:30

treaty claims, don't corrupt acts

00:18:31

perpetrated by the investor. It's

00:18:34

important to be cognizant of

00:18:35

the complicity of station in

00:18:36

the alleged acts of corruption

00:18:37

there. Also, competing values of



00:18:39

play here on the one

00:18:41

hand, the desirability of giving

00:18:42

effect to the public policy

00:18:44

against enforcement of crap transactions

00:18:46

on the other, the public

00:18:48

policy of sustaining International arbitration

00:18:49

agreement contain with an investment

00:18:51

treaties and ensuring the states

00:18:53

are not able to profit

00:18:54

from their own misconduct. Clear

00:18:58

that transactions involving the corruption

00:18:59

of public. Officials are violation

00:19:01

of international public policy International



00:19:03

Community, has a direct interest

00:19:04

in combating corruption at all

00:19:06

levels. The Seminole State and

00:19:08

of this principle was made

00:19:09

by judge lagergren in a

00:19:12

1963 ICC case in which

00:19:14

your marker, that's Corrections and

00:19:16

international legal. It's contrary to

00:19:18

good morals and to International

00:19:19

public policy, the community of

00:19:21

Nations So, turning to one

00:19:24

of the key questions that

00:19:26

I'll be covering today. What



00:19:27

are the consequences for the

00:19:28

arbitration of the alleged corrupt

00:19:30

acts taking place in the

00:19:32

outside investment, or when the

00:19:33

investment was already operating. So

00:19:36

I can get that background,

00:19:37

we can move to consider

00:19:38

the specific consequences. As I

00:19:41

mentioned, are too interconnected issues

00:19:43

to Grapple with hear. The

00:19:44

first of the temporal one,

00:19:45

we need to address at

00:19:46

one point in time. The



00:19:47  
alleged corruption, contaminates, the investment,

00:19:49  
the second issue is an

00:19:51  
interpretive, one relating to the

00:19:53  
specific language of the treating

00:19:54  
question on whether there's a

00:19:55  
requirement that the investment is

00:19:57  
made in accordance with the

00:19:58  
laws of the host. So

00:20:00  
the first situation that falls

00:20:02  
to be considered is where

00:20:03  
the relevant investment treaties specifies.

00:20:05  
As many do that the

00:20:06  
investment should have been made



00:20:08

in accordance with the laws

00:20:09

and regulations that hosted. An

00:20:11

alleged corruption took place at

00:20:12

the outset or establishments of

00:20:15

the investment. This obviously creates

00:20:18

jurisdictional difficulties for investors as

00:20:20

big as acts of corruption,

00:20:20

will almost always be Malaysia,

00:20:23

post States laws. Investment tribunal

00:20:27

certificate. We interpreted such requirements

00:20:28

to be an issue of

00:20:29

jurisdiction in Selene Morocco. The

00:20:32

tribunal State at the relevant



00:20:33

Claus in Italy. Morocco b

00:20:35

i t sought to prevent

00:20:36

the treaty from protecting Investments,

00:20:38

that should not be protected

00:20:39

because they would be legal.

00:20:41

A similar approach was taken

00:20:43

in front door Philippines, where

00:20:45

it was found that investment,

00:20:46

apply the laws of the

00:20:47

host State at the time.

00:20:48

It's made in order to

00:20:49

get 40 protection, however, the

00:20:52

distinction between a legality of



00:20:54

the outset or the time

00:20:55

of Investments and supervening legality

00:20:57

occurring, when the investment had

00:20:59

already, been made remarkable for

00:21:01

the time of initiation of

00:21:03

investment there, is in compliance

00:21:04

with the law of those

00:21:05

State allegations by the hostess

00:21:07

violations of its law on

00:21:08

the course of the investment.

00:21:10

As a justification for State

00:21:11

action, with respect to the

00:21:12

investment, might be a defense



00:21:14  
to claim substantive violations ebit,

00:21:17  
but could not deprive. A

00:21:18  
tribunal acting under the authority

00:21:19  
of the vit, B jurisdiction.

00:21:22  
In some cases, this has

00:21:24  
been taken Further Supply in

00:21:26  
circumstances where there is no

00:21:27  
specific language in the investment

00:21:29  
treaty to this effect. So

00:21:31  
for example, in Hollister Ghana

00:21:33  
which where it was found

00:21:34  
that investment will not be

00:21:35  
protected. If it has been



00:21:37

created in violation of national

00:21:38

International principles of good faith

00:21:39

by with corruption fraud or

00:21:42

deceitful conduct. And that there

00:21:44

are general principles that exist

00:21:46

independently of specific language to

00:21:48

this effect in the treaty.

00:21:50

So the second situation is

00:21:53

going contemplated in front porch,

00:21:54

Philippines case where the investment

00:21:56

has been made, loftily. But

00:21:57

supervening corruption is subsequently occurred

00:21:59

in yukos Russia when considering



00:22:02

allegations of bad face and

00:22:04

illegal conduct against the investor.

00:22:06

The tribunal found that there

00:22:07

was no compelling reason to

00:22:08

deny all together, the right

00:22:10

to invoke the treats and

00:22:11

investor was breached the wall,

00:22:13

the host state. Following the

00:22:16

Investments being made its investor

00:22:19

act illegally. The hosted can

00:22:21

in the words of the

00:22:22

tribunal requested to correct Its

00:22:23

Behavior. And impose upon its



00:22:25

sanctions available under domestic law,

00:22:27

but it would undermine the

00:22:29

purpose and objectivity. CT, the

00:22:31

Define to deny, the investor

00:22:33

the right to make his

00:22:33

case for an arbitral tribunal.

00:22:35

Based on the same alleged

00:22:36

violations, the existence of which

00:22:39

the investor seeks to dispute

00:22:40

on the Merritt. So, in

00:22:42

this situation there for the

00:22:44

corruption effects of lovely establishment,

00:22:45

vestment, it would seem that



00:22:47

the tribunal needed less have

00:22:48

jurisdiction of the claim, and

00:22:50

the consequences of corruption are

00:22:51

to be dealt with at

00:22:52

the merits face. So once

00:22:54

the approach that I've just

00:22:55

discussed has been adopted by

00:22:57

investment tribunals based on some

00:23:00

of a strict interpretation quite

00:23:01

often. The relevant investment treaty

00:23:03

treating corruption exclusively as an

00:23:05

issue of jurisdiction has raised

00:23:07

concerns among some commentators for



00:23:08  
the following reasons. First, the

00:23:11  
question of a tribunal stress

00:23:12  
fiction is so they concerned

00:23:13  
with the adjudicative power that

00:23:15  
5. You know this assessment

00:23:16  
seems unsuited for international policy

00:23:19  
such as corruption, s corruption

00:23:22  
that has occurred between an

00:23:23  
investor in a state does

00:23:24  
not automatically invalidate. The state's

00:23:26  
consents, arbitrate under the relevant

00:23:28  
investment treaty due to the

00:23:29  
doctrine of some cases such



00:23:32

as flammable Gary support this

00:23:34

approach. So, regardless of jurisdiction

00:23:41

or ability, it almost always

00:23:43

operates as an opposite bar

00:23:45

to the proceedings. It's an

00:23:47

investment is Tainted by corruption

00:23:48

tribunal to be very unwilling

00:23:50

to entertain the claims of

00:23:51

investors on the merits of

00:23:53

the case. Regardless. So I'm

00:23:55

not briefly turn to how

00:23:57

investors in State's approach, the

00:23:58

issue of corruption differently in



00:23:59

framing their respective arguments in

00:24:02

practice. It's generally the advantageous

00:24:04

for states to start that

00:24:06

investor is engaged in Corrupt

00:24:07

Practices for jurisdictional reasons. But

00:24:10

I've already outlined seeing an

00:24:12

example of this, in the

00:24:13

enforcement proceedings. At the moment

00:24:15

between p&id, Nigeria, in that

00:24:19

case, Nigeria alleges that the

00:24:20

investor obtain, the underlined contract

00:24:22

by bribing Nigerian officials, not

00:24:25

just that, but that the



00:24:26

investor also subsequently bribe Nigeria's,

00:24:28

legal counsel to ensure that

00:24:30

the country would not contest

00:24:31

the arbitration vigorously. The award

00:24:33

rendered amounted to approximately 10

00:24:35

billion US Dollars and if

00:24:37

he's corruption allegations are substantiated

00:24:39

the challenge, the award will

00:24:40

likely succeed. The shows the

00:24:42

significant incentives for states to

00:24:44

substantiate the corruption allegations against

00:24:46

investors. Unclean hands or as

00:24:55

we just discussed things investment



00:24:57

was made by the investor

00:24:58

was not made according to

00:25:00

the laws of the whole

00:25:00

state. Alternatively, this claim is

00:25:04

inadmissible because it is found

00:25:05

on construction and therefore contrary

00:25:07

to International public policy, and

00:25:10

finally States me also attempt

00:25:11

to bring counterclaims based on

00:25:13

corruption against investors of these

00:25:15

are Franklin. Likely to succeed

00:25:16

for counterclaim to be brought

00:25:18

the claim must be within



00:25:19  
the jurisdiction of the tribunal

00:25:21  
or orbital Center. Let's stay

00:25:23  
in the case of excited

00:25:24  
and I must arise directly

00:25:25  
out of the subject matter

00:25:26  
of the dispute. However, it's

00:25:28  
unlikely. The founding jurisdiction for

00:25:30  
corruption, based on counterclaim will

00:25:32  
run on the same issues

00:25:33  
as the primary claim brought

00:25:34  
by the investor investment has

00:25:36  
been maybe legally, there will

00:25:37  
be no investment and the



00:25:39  
tribunal will therefore have no

00:25:40  
jurisdiction to hear the counter.

00:25:41  
As was the case in

00:25:43  
the metal test was as

00:25:44  
we discussed in Metal Tech.

00:25:47  
The final in circumstances, where

00:25:48  
state is engaged in corruption.

00:25:50  
Investors may claim a breach

00:25:51  
of the fac standard by

00:25:53  
Me by Example, particularly if

00:25:54  
they come to, the tribunal

00:25:55  
has clean hands, so to

00:25:56  
speak, not engaged in the



00:25:58

crop practice. So, interesting. In

00:26:00

EDF Romanian, the tribunal agreed

00:26:02

to a request for a

00:26:03

bribe by state agencies in

00:26:04

violation of the fit standard

00:26:06

in circumstances, where the investor

00:26:08

who refused to pay a

00:26:09

bribe, your contract extension soap.

00:26:12

Just to keep up with

00:26:13

coming, to get practice of

00:26:14

sticking to our time constraint.

00:26:16

I'll briefly conclude here, which

00:26:18

is simply to say that.



00:26:19

I said at the outset,

00:26:20

the real difficulty with corruption

00:26:22

investment, treaty claims that the

00:26:23

state's participation is implicit in

00:26:25

the very nature of corruption

00:26:26

is the policy dilemma at

00:26:28

the heart of it and

00:26:29

frankly also quite often the

00:26:31

evidentiary one which will be

00:26:32

discussed by Mike O'Connell. Thank

00:26:36

you so much. Glad that

00:26:37

was extremely helpful and I

00:26:39

know her Russian is such



00:26:41

a big topic and each

00:26:43

of us is challenged to

00:26:44

address any aspect of it

00:26:47

in this very short amount

00:26:48

of time. So thank you

00:26:49

so much for doing such

00:26:50

an incredible job of addressing

00:26:52

those aspects. I think I'd

00:26:54

like to hear from you

00:26:55

and what your thoughts are

00:26:56

on the legal aspects that

00:26:58

who ledge address. And I

00:27:07

think, I think you're still



00:27:07  
on mute. Sorry, I was

00:27:11  
thinking to myself what a

00:27:12  
time and didn't ask, because

00:27:13  
Julian has stopped the pain

00:27:15  
that everything I have. So

00:27:17  
that can be said, which

00:27:19  
means I could focus on

00:27:20  
the points of Discord. I'm

00:27:22  
so full of discussion between

00:27:24  
a practitioners and and Scholars.

00:27:26  
And there is a general

00:27:29  
understanding that when an investment

00:27:32  
and is procured by corruption.



00:27:34

We, we end up with

00:27:37

the tribes, you know, not

00:27:38

exercising a jurisdiction. I'll give

00:27:40

you this can be by

00:27:42

application of the legality closer

00:27:44

to be 80 in the

00:27:45

picture because there would be

00:27:48

no investment to protect that

00:27:49

investment or certain drivers have

00:27:53

found in the in the

00:27:55

absence of the claim will

00:27:59

not be admissible because of

00:28:01

the principal of public international



00:28:04

law. Is that like memo

00:28:07

detour or Clean Hands Doctrine?

00:28:10

Or something else. Breezy Oak

00:28:13

View. Middle schoolers Zachary. Douglas

00:28:17

is one of them saying

00:28:19

that they legality closing. Closing,

00:28:21

vit was not aimed at

00:28:24

precluding situation, whereby an investment.

00:28:27

I have procured by corruption

00:28:28

the clothes simply said, says

00:28:31

to me deals with the

00:28:32

Purcell guide of investment, for

00:28:35

example, and if the national



00:28:37

law does not allow an

00:28:39

investment in a specific industry

00:28:41

because of not like Colton

00:28:42

to be days or something

00:28:44

like that. This investment is

00:28:45

not protected by the b.

00:28:46

I t. It snow every

00:28:49

kind of significant legality or

00:28:51

no significant. The guy leads

00:28:53

to a jurisdictional obstacle and

00:29:00

the other elements that option.

00:29:12

Which has taken place at

00:29:14

some point in the life



00:29:16  
of the investment and notes.

00:29:18  
At the beginnings are all

00:29:19  
the stages of there is

00:29:26  
no clear Trend that different

00:29:28  
commercial knows. Different different National

00:29:30  
laws deal with the effects

00:29:33  
of corruption in different ways

00:29:35  
that are not under, which

00:29:38  
the contract would be considered

00:29:41  
as a Benicio invalid. And

00:29:44  
a four parties would be

00:29:46  
asked to remember the other

00:29:49  
of everything that they have



00:29:49  
received the contracts and laws,

00:29:53  
that just give the option

00:29:55  
to the victim of the

00:29:57  
legality of the correct option

00:29:58  
to decide whether to execute

00:30:00  
the contract or enforce it

00:30:02  
or two to seek an

00:30:04  
annulment that off at cetera.

00:30:06  
And it's not certain that

00:30:09  
we have an international standard

00:30:11  
because if we can follow

00:30:13  
last number we applying us

00:30:15  
know when the dispute against



00:30:17  
the state or I'd held

00:30:18  
up a contract when it

00:30:20  
does not matter. I just

00:30:21  
out of a b, a

00:30:22  
t, it is a big

00:30:23  
discussion as to what should

00:30:25  
the driving I do? Should

00:30:26  
we focus on contributory and

00:30:28  
iPhones? And reduce damage, is

00:30:30  
to become seed there than

00:30:32  
at the contractual relationship is

00:30:35  
a relationship and therefore sea

00:30:39  
or the restitution. That is



00:30:41  
actually very difficult in practice

00:30:44  
in such situations. And the

00:30:46  
last point I wanted to

00:30:49  
make it, we can discuss

00:30:50  
further. And is this is

00:30:54  
me the exact point raised

00:31:00  
by the ABS against Romania.

00:31:02  
Tribunal said that, In order

00:31:08  
to base a claim against

00:31:10  
the estate on the request

00:31:12  
of corruption by the state

00:31:14  
and its states seeking to

00:31:15  
be paid bribery. The investor



00:31:19

has also proved that the

00:31:22

state. So the bribery acting

00:31:25

as some sort of official

00:31:26

capacity, said they weren't against

00:31:33

the same thing and and

00:31:36

and this is a general,

00:31:40

it is. It's an awfully

00:31:44

difficult standards to apply the

00:31:48

States official capacity is no

00:31:52

corruption and if it does

00:31:54

not equal to the stage

00:31:56

which I kind of money

00:31:58

invested between a rock and



00:32:00

a hard place. And just

00:32:02

so as to say that

00:32:04

this kind of condition. Articles

00:32:08

on the responsibility of states

00:32:10

for international. Wrongful act, thank

00:32:19

you so much are Tina.

00:32:20

And I think so much

00:32:22

of what we see is

00:32:23

that there is such a

00:32:24

difficulty in proving corruption. And,

00:32:27

and so, so many of

00:32:28

these questions arise out of

00:32:30

the fact that the evidence



00:32:31

is difficult to find and

00:32:34

and then and difficult to

00:32:35

present in the arbitration contact.

00:32:37

So I'd like to go

00:32:38

to Pedro now because Pedro

00:32:40

it has a great benefit

00:32:43

of being a cross practice.

00:32:46

Practitioner he does both White

00:32:49

Collar work on corruption, investigations

00:32:51

and international arbitration. And Pedro

00:32:53

is going to talk to

00:32:54

us, a bit about how

00:32:55

states do substantiate their corruption



00:32:58  
allegations in the criminal context,

00:33:00  
and especially when those investigations

00:33:03  
are running in parallel to

00:33:05  
International Airport. What are some

00:33:08  
of the aspects of the

00:33:10  
states actions? Maybe? Thank, thank

00:33:13  
you rainbow and and good

00:33:14  
morning. Good afternoon, everybody first

00:33:17  
night, my deep appreciation of

00:33:19  
the organizers for the invitation.

00:33:20  
It really is a pleasure

00:33:22  
to be here with these

00:33:23  
panels housekeeping and I are



00:33:28  
supposed to go without saying,

00:33:29  
but you know, I'm a

00:33:30  
lawyer. I'll say it. Anyway,

00:33:31  
I'm joining you guys today

00:33:34  
and speak for Gibson Dunn

00:33:40  
at B Printing client. Gets

00:33:41  
them done, but I did

00:33:43  
want to share some thoughts

00:33:44  
on a based on experience

00:33:45  
of different matters that that

00:33:48  
I've seen over the years.

00:33:48  
My my perspective is as

00:33:53  
rainbow was saying, an incoming



00:33:54

into this. I worked on

00:33:56

International arbitration, probably ten or

00:33:59

twelve of them over the

00:34:00

years. Best pieces. Behalf of

00:34:02

claimants, and on behalf of

00:34:04

sovereign states, and also commercial

00:34:07

arbitration cases. But I think

00:34:09

the more relevant part of

00:34:11

my perspective is That is

00:34:14

certainly your last. I cannot

00:34:15

really focused on White Collar

00:34:19

criminal defense and that is

00:34:20

primarily corruption cases in in



00:34:24

a couple of dozen countries

00:34:27

around the world. So I

00:34:28

I'm kind of high team

00:34:29

the scheme's. I've seen the

00:34:31

enforcement actions by different governments

00:34:33

and how you actually get

00:34:35

to prove. Those cases of

00:34:38

the pit of my perspective

00:34:39

on staying in it. It

00:34:41

may sound funny to say

00:34:43

it is I think Russian

00:34:45

is very easy to prove,

00:34:46

you just need the right



00:34:47  
tools for it. And I

00:34:49  
think the challenges does international

00:34:52  
arbitration have those tools available

00:34:54  
in quite the same way

00:34:56  
that that the cases that

00:34:58  
I see on the other

00:34:59  
side of the Ledger, right?

00:35:00  
Criminal enforcement have them. I'm

00:35:03  
taking a step back in

00:35:06  
the modern practice that we

00:35:08  
see in the white collar

00:35:10  
bar. In terms of corruption

00:35:11  
cases, it has been tremendously



00:35:14  
Effective Government. Didn't you all

00:35:16  
have seen the headlines are

00:35:19  
our regularly racking up. He'll

00:35:22  
hundreds of millions if not

00:35:23  
billions plus dollar penalties. In

00:35:26  
settling corruption cases around the

00:35:29  
world challenges that that a

00:35:32  
lot of the things that

00:35:33  
work in that context are

00:35:35  
not available here, right? And

00:35:37  
I wanted to share those

00:35:39  
things that I did. I

00:35:40  
think it worked. The first



00:35:42  
is it if you take

00:35:43  
the top 10 enforcement matters

00:35:45  
for corruption around the world

00:35:46  
and I say this again

00:35:49  
from the perspective of the

00:35:50  
US while you're so focused

00:35:51  
primarily on actions by the

00:35:52  
US Department of Justice of

00:35:54  
the US Securities and Exchange

00:35:56  
Commission. Those cases go from

00:35:58  
like \$759 to 3 +

00:36:01  
billion dollars in pounds. Every

00:36:04  
single one of those cases,



00:36:05

again talking about the top

00:36:06

10, every single one of

00:36:07

those cases has one thing

00:36:08

in common, which is the

00:36:10

person that use the end

00:36:11

of the accused of corruption

00:36:12

has come in and cooperate

00:36:14

voluntarily. So I'm getting all

00:36:17

interior stays a bit of

00:36:18

a funny turn right now,

00:36:19

come in and self-disclose the

00:36:22

contact. But when they've been

00:36:23

approached by the government, they've



00:36:24

all cooperated and cooperation mean,

00:36:27

you are normally when some

00:36:29

of these cases You are

00:36:30

conducting their own investigation, your

00:36:33

training, over your giving, the

00:36:34

government presentations of that investigation,

00:36:36

you're off in producing hundreds

00:36:38

of thousands of pages of

00:36:39

documents to the government. Showing

00:36:41

the corruption, you are sharing

00:36:44

a train work product. You

00:36:46

are engaging forensic, accountants that

00:36:49

will analyze transaction and then



00:36:52

sharing the results of that

00:36:53

with the government. So the

00:36:54

government is touting, all these

00:36:55

cases that it that is

00:36:57

able to resolve, but really,

00:36:58

it's not just unsure, investigative

00:37:00

power. You have the number

00:37:01

one incentive is Otherwise, defendants

00:37:04

are coming in and providing

00:37:06

the information, obviously, that's not

00:37:08

available in the context of

00:37:09

international arbitration, another huge tool

00:37:12

that isn't available in the



00:37:13

show. The example, the US

00:37:18

Securities and Exchange Commission will

00:37:20

pay between 10 and 30%

00:37:22

of the amount that whistleblower

00:37:23

of the scheme that whistle

00:37:25

blower. Blow the whistle on

00:37:27

the largest awarded is over

00:37:29

a quarter billion dollars. That

00:37:31

has been given to a

00:37:32

whistleblower who came and reported

00:37:33

back to the incentives. There

00:37:35

are very very different. I

00:37:38

would also note that is



00:37:39

it in the context of

00:37:41

arbitration tribunals, a lot of

00:37:44

the criminal tools that you

00:37:46

would have again setting aside,

00:37:47

cooperation setting aside, The Whistleblower

00:37:49

just start out right? Whether

00:37:51

it's a wiretap, whether it's

00:37:55

a mutual legal assistance request,

00:37:58

right? So-called emblems whether it's

00:38:00

subpoena write, an arbitration tribunal

00:38:01

isn't doing any of those

00:38:03

things because I can't and

00:38:05

so that is a huge



00:38:05  
challenge to how evidence can

00:38:07  
be gathered. But I wanted

00:38:10  
to touch on one wrinkle

00:38:12  
that I think is even

00:38:13  
more interesting, which is why

00:38:14  
we often talked about the

00:38:15  
claimants engaged in corrupt, right?

00:38:18  
If you bribe someone to

00:38:20  
get that, can bribe someone

00:38:22  
to get that license or

00:38:23  
to get that deal. I

00:38:25  
think the image there is

00:38:27  
is relatively clear for all



00:38:28  
of us and our heads.

00:38:29  
But I think a, a

00:38:31  
more difficult scenario is perspective,

00:38:34  
is what happens when the

00:38:35  
claimant is alleging, that the

00:38:36  
state has acted wrong because

00:38:39  
they're obviously the state, the

00:38:41  
state has some tools, and

00:38:42  
can rely on his law

00:38:43  
enforcement, a attitude and wire,

00:38:45  
tap phones. If and pull

00:38:47  
account records at 10, go

00:38:48  
to bank, to get that



00:38:49  
information. Least domestically Clements don't

00:38:52  
have it. So I think

00:38:53  
a, a a a a

00:38:54  
huge challenge is what happens

00:38:58  
in a situation tonight. I

00:38:59  
seen it in some of

00:39:00  
my manners, we are the

00:39:01  
private. Claimant is affirming that

00:39:04  
the state has tried to

00:39:05  
extort them in some way

00:39:07  
in the claimant has refused

00:39:08  
right to vote. Bribery that

00:39:09  
the state has tried to



00:39:11

extort him in some way

00:39:12

and the challenges, you know,

00:39:14

the claimant makes bile a

00:39:16

local request for an investigation

00:39:17

with the local authorities. But

00:39:20

there is a perverse incentive

00:39:21

for States, not to act

00:39:23

on those investigations, not to

00:39:25

find the wrongful conduct because

00:39:26

if it did, it would

00:39:27

severely hurt his chances in

00:39:30

an arbitration proceeding, There are

00:39:39

other challenges when it comes



00:39:41  
to evidence that in the

00:39:42  
start of the criminal enforcement

00:39:44  
world, we see the first

00:39:46  
is that over, 90% of

00:39:48  
the criminal actions that have

00:39:50  
been resolved in the US

00:39:52  
under the foreign bribery laws

00:39:53  
have involved misconduct by Third

00:39:56  
parties. In other words, was

00:39:57  
in the company necessarily, but

00:39:58  
they hired a consultant that

00:40:00  
went out and did the

00:40:01  
did the deed, if you



00:40:02

will, that is obviously it's

00:40:04

quite funny challenging position for

00:40:07

a tribunal to be in

00:40:08

because it's not even the

00:40:10

parties in front of it,

00:40:11

that are necessarily going to

00:40:12

have all the evidence and

00:40:13

documentation, but rather you're getting

00:40:15

into the world of of

00:40:17

third parties. And I think

00:40:18

frankly tribunals have a very

00:40:19

difficult and there because it

00:40:22

did was very limited in



00:40:23

what they can. The other,

00:40:27

and I'll make it again

00:40:28

in the spirit of of

00:40:29

of a wrapping things up

00:40:30

here. With with time is

00:40:32

there are countries were this

00:40:33

is a lot harder to

00:40:34

write. So even if you

00:40:36

have international legal cooperation and

00:40:38

by the way, this happens

00:40:39

all the time that UK

00:40:41

cooperate tremendously with the US

00:40:43

the French authorities, a German



00:40:45  
authorities, the Brazilian authorities are

00:40:47  
all very good. I just

00:40:48  
want to investigate these matters.

00:40:51  
Even if you have that

00:40:52  
cooperation, your other countries that

00:40:54  
are just hard, right? Switzerland

00:40:56  
famously refused for for forever

00:40:58  
to provide banking records on

00:41:01  
account of privacy, won't go

00:41:02  
get it. The kind of

00:41:03  
thing that makes finding corruption

00:41:05  
a lot harder for chicorelli.

00:41:07  
If you're an international tribunal,



00:41:08

it doesn't have these tool.

00:41:10

The final point, I'll make

00:41:12

Injustice 2 in the spirit

00:41:13

of a thought discussion hearing.

00:41:15

What do you do in

00:41:16

a case in which 8A

00:41:19

state with access to, its

00:41:22

resources, without access to wiretap

00:41:23

in Pinos and bank records

00:41:25

and everything. At least within

00:41:26

its own jurisdiction claims that

00:41:28

its found that it has

00:41:29

corruption and sound corruption by



00:41:31  
the claimant, and then swings

00:41:33  
and misses. And I'm thinking

00:41:35  
of a matter of where

00:41:36  
estate presented, you know of

00:41:39  
wiretap records and the wire

00:41:41  
kept records in the oven.

00:41:43  
Should that move the tribunal

00:41:45  
to say look if if

00:41:46  
you come in and you

00:41:48  
will let corruption and you

00:41:50  
swing and you miss, does

00:41:52  
that should that itself? A

00:41:54  
kind of move the needle



00:41:55  
from your perspective, really believe

00:41:57  
that option. That did or

00:41:59  
didn't happen without I apologize.

00:42:07  
Thank you so much, Pedro

00:42:09  
that was super interesting and

00:42:13  
I think extremely helpful to

00:42:14  
our audience because we don't

00:42:16  
get the opportunity to hear

00:42:17  
from people who are saying

00:42:18  
this from the criminal and

00:42:20  
Regulatory enforcement side are very

00:42:22  
regular basis. I'm glad I'd

00:42:24  
like to turn to you



00:42:25

to hear what you have

00:42:26

to say about Pedro's thoughts

00:42:28

from the international arbitration perspective.

00:42:32

Thank you. A thank-you. Pedro.

00:42:34

I get to to Fox,

00:42:35

come to mind. Having one

00:42:36

of them as Pedro. Very

00:42:38

clearly showed explored save the

00:42:40

tools that are available in

00:42:42

investigations are proceeding, domestically in

00:42:45

the US, Senate in particular,

00:42:46

and for me, what sort

00:42:48

of stood out I guess



00:42:48

is some of the authorities

00:42:51

or government bodies? That he

00:42:52

referred to other estate deal

00:42:53

J or the SEC in

00:42:54

this earth, police powers that

00:42:56

are available to them for

00:42:57

the purpose of Investigation or

00:42:58

collecting evidence. And the fact

00:43:00

that voluntary cooperation accursed out

00:43:03

off, Matthew speaks to those

00:43:05

Powers which can easily be

00:43:07

replicated by International tribunals. The

00:43:11

other point, which I think



00:43:12

is wrong for throwing some

00:43:13

attention to sort of the

00:43:14

game player threshold issue around

00:43:16

corruption allegations which is whether

00:43:18

or not a state. For

00:43:19

example, bring the defense it

00:43:21

all before we even get

00:43:22

the topic of evidence, right?

00:43:23

And that it question itself

00:43:25

is a very complicated woman.

00:43:26

What if it's the the

00:43:29

same Administration that that accepted

00:43:31

the bribe? Bring it up



00:43:33

as a defense. What if

00:43:35

it's a different sort of

00:43:36

government bodies, 12 actually defend

00:43:39

the states in the relevant

00:43:40

proceedings? And another one that

00:43:41

was involved, involved in the

00:43:43

exception of the investment itself.

00:43:45

And so a lot of

00:43:46

these questions do come up

00:43:48

in in the early stages

00:43:49

and I'm sure there are

00:43:50

perhaps more instances and investment

00:43:52

for the arbitration where corruption



00:43:53

could be raised as a

00:43:55

valid defense. Wear for one

00:43:57

reason or another out of

00:43:58

expediency. It's decided not to

00:44:00

actually instead of decisions made

00:44:02

to bring other jurisdiction. Objections,

00:44:04

were objections, based on on

00:44:05

the Merritt. So I thought

00:44:06

I'd find that. It's often

00:44:07

complicated, Gateway Worship with her

00:44:09

not to bring up the

00:44:10

defense or even bring for

00:44:12

the evidence SS bigger mentioned.



00:44:14

There are certain interested parties

00:44:16

that might affect the state's

00:44:18

ability to bring that forward.

00:44:26

Thank you so much for

00:44:27

let that sit. It's all

00:44:28

very interesting and Athena. I'm

00:44:30

going to go to you.

00:44:30

Now, we have touched on

00:44:32

so many different aspects of

00:44:34

corruption claims today, from the

00:44:38

differing standards of proof that

00:44:39

have been applied to weather

00:44:42

depending on the evidence and



00:44:45  
when the corrupt acts occurred,

00:44:46  
whether it is impact jurisdiction

00:44:49  
or the merits. And so

00:44:51  
I'd like to hear from

00:44:52  
you on the types of

00:44:55  
takeaways that we have what

00:44:58  
are the best practices that

00:45:00  
an arbitral tribunal can apply

00:45:02  
when they are addressing corruption

00:45:04  
claims. Thank you. Thank you

00:45:11  
very much rainbow for the

00:45:12  
question and again, that are

00:45:16  
many aspects of the arbitration.



00:45:24

We look at what is

00:45:27

certain is that arbitrators have

00:45:30

to have corruption somewhere in

00:45:32

the back of their minds

00:45:34

and to be aware of

00:45:37

the evolving standard as to

00:45:38

what is corruption. And of

00:45:42

course, I can grab some

00:45:43

today. He's a 14 in

00:45:46

every place globally to the

00:45:57

difference between India be in

00:45:59

influence and low beam which

00:46:02

is relevant for arbitrators to



00:46:04

to, to know. Just just

00:46:07

remember to give her that

00:46:08

we are discussing about. We

00:46:10

haven't African Focus today that

00:46:12

the Africans Union convention on

00:46:14

preventing and combating Corruption. It

00:46:18

has been ratified by practically.

00:46:20

I have a totality of

00:46:21

African States. Another another point

00:46:29

that tribunal should I take

00:46:33

into account is not, there

00:46:36

is a shape of their,

00:46:37

their, their, their RB convention



00:46:41

but also there are my

00:46:44

checklist by several institutions to

00:46:47

ask the red flags as

00:46:49

to what they drive. You

00:46:50

know what what foods raise

00:46:53

the eyebrows overdrive. You know

00:46:55

what I should bring their

00:46:56

bathing suits, is there to

00:46:58

the fact that there may

00:46:59

be some photo of some

00:47:00

sort of Corruption of troll

00:47:02

times in the case and

00:47:06

there are very few checklists



00:47:09

corruption there is a very

00:47:16

famous Lord rules for a

00:47:19

report on business ethics and

00:47:22

the base that used to

00:47:23

choose on Governors have also

00:47:24

provided a cute turkey for

00:47:26

You traitors with such a

00:47:28

red flag list and Barbie

00:47:31

at the same time, count

00:47:34

that red flags have being

00:47:36

developed in the account and

00:47:40

do the regions and, and

00:47:42

processes that Enterprises in action



00:47:47  
in order to combat corruption.

00:47:48  
They, they do not necessarily

00:47:51  
to burden of proof and

00:47:58  
proven corruption. And, and there's

00:48:01  
something that is not worth

00:48:02  
cuz I wanted to race

00:48:03  
with you. Is that regards

00:48:06  
to something? That is a

00:48:07  
red flag, a decision of

00:48:08  
a state to ground a

00:48:10  
conversation with outside proceeding through

00:48:12  
a rebuilding process. We have

00:48:16  
no thingy that has a



00:48:19  
red flag but deciding differently

00:48:22  
in the Bowl against turn

00:48:24  
to low 2022. Decision in

00:48:28  
the court of appeal of

00:48:30  
Paris used it. As a

00:48:31  
red flag, supporting the timing

00:48:34  
of corruption in the Congo

00:48:37  
against the cast of Psych

00:48:39  
on site on CJ's, or

00:48:41  
in the guinea against global

00:48:43  
voice. Okay. So it's a

00:48:45  
red flag but it's not

00:48:46  
a proof on its own



00:48:47

and in another point, but

00:48:50

it is very relevant, is

00:48:52

that sometimes we see used

00:48:55

in arbitration, as a red

00:48:56

flag, the fact that the

00:48:59

accounting equation has every option

00:49:01

index. And again, this is

00:49:04

fine as a red flag.

00:49:06

When what is at stake

00:49:07

is the process that the

00:49:09

Enterprise would put forwards to

00:49:10

do to fight corruption, but

00:49:13

when an arbitrator uses it



00:49:15  
as a red flag for

00:49:17  
corruption, the line between using

00:49:20  
a red flag and just

00:49:21  
being biased is everything in

00:49:25  
my Mind if we have

00:49:30  
time the question as to

00:49:36  
whether the Tribune is under

00:49:39  
a beauty to investigate corruption

00:49:40  
and whether the tribunal has

00:49:42  
the means to investigate corruption

00:49:44  
will allow me a couple

00:49:46  
of minutes to, to deal

00:49:48  
with with me to draw



00:49:52  
the basic Airlines of discussion.

00:49:54  
Because, again, there's a lot

00:49:55  
to be said, but as

00:49:57  
we already discussed in this

00:49:58  
panel, The duty to fight

00:50:01  
corruption is considered to be

00:50:02  
part of public policy today

00:50:05  
and also form part of

00:50:09  
the arbitrator's duty to ensure

00:50:11  
the enforceability of the award.

00:50:13  
But what can I do

00:50:15  
to do? And what can

00:50:17  
an arbitrator don't in order



00:50:18

to investigate corruption is a

00:50:19

big discussion and and of

00:50:21

course Pedro has already passed

00:50:22

upon and but it is

00:50:28

to think, in terms of

00:50:30

the two main a diverging

00:50:34

approaches also to the tribunal

00:50:37

has ruled in contacting the

00:50:39

proceedings. And there is no

00:50:42

inquisitorial approach and the adversarial

00:50:44

approach we've been crazy. Toriel

00:50:49

approach that we seen very

00:50:50

many civil law system. For



00:50:52

example, of the arbitrator is

00:50:55

very actively involved in investigating.

00:50:59

The facts of the case

00:51:00

and therefore investigate factual elements

00:51:06

on their own initiative. All

00:51:12

the other hands made me.

00:51:13

Come on low countries. Mostly

00:51:18

adversarial approach, which focuses on

00:51:21

the party autonomy. And According

00:51:24

to, which the parties are

00:51:27

the players who should bring

00:51:29

their in the necessary evidence.

00:51:31

What's a dragon I can



00:51:33

do or cannot do is

00:51:35

also a matter of who

00:51:38

we be the jobs, controlling

00:51:39

the decision of the tribunal.

00:51:40

If the controlling jobs for

00:51:42

nose anniversary approach, the tribunal

00:51:45

has some possibility to investigate

00:51:48

corruption at least one party

00:51:52

has a large states and

00:51:53

enter for the RAV4 and

00:51:56

see if I can take

00:51:58

play with the evidential burden

00:52:04

of proof Etc. Is the



00:52:07  
inquisitorial approach. Is there any

00:52:17  
way that the arbitrator has

00:52:18  
is much? Wider is a

00:52:21  
30-ton on their own account,

00:52:24  
but raised questions of corruption

00:52:27  
and ask the parties to

00:52:29  
discuss days in the proceedings.

00:52:31  
And possibly as a steak

00:52:33  
on the stove and enclosing

00:52:39  
and following up on what

00:52:41  
Calum has eyes of the

00:52:42  
very beginning. Today. What the

00:52:44  
french judge asks from the



00:52:47

arbitrator's is exactly to take

00:52:49

such a very active approach.

00:52:50

When I went to see

00:52:52

the obituaries in France and

00:52:54

when the French John will

00:52:56

be the control judge of

00:52:57

the arbitration award. Thank you

00:53:02

so much. I think I

00:53:03

think those are those are

00:53:04

very good pointers for arbitrators.

00:53:06

And also some very tricky

00:53:08

questions that we are all

00:53:11

struggling with that. As we



00:53:13  
look at issues of corruption,

00:53:14  
tell him, I'd like to

00:53:16  
go to you because you

00:53:17  
started out by introducing us

00:53:18  
to some of what has

00:53:19  
happened in the French courts

00:53:21  
over the past year. And

00:53:23  
I'd like to hear what

00:53:23  
you think about what Athena

00:53:26  
has just talked about. In

00:53:27  
terms of, you know what

00:53:28  
weather going to control court

00:53:30  
is going to end. How



00:53:32

control courts have acted in

00:53:34

particular for arbitration, seated in

00:53:36

France and how that may

00:53:38

impact our virtual practice. I

00:53:43

mean, I agree with what

00:53:44

I have to say. I've

00:53:46

been thinking about the different

00:53:49

standards that you would apply

00:53:50

depending on your feet, right?

00:53:52

And if you were lucky

00:53:54

enough, but I'm going to

00:53:55

have a seat seated in

00:53:57

Paris. You have more power,



00:54:00  
inquisitorius Powers available to you.

00:54:01  
Even if you come from

00:54:02  
a coma background versus, if

00:54:04  
you were, you asked where

00:54:06  
you were? So it makes

00:54:17  
me a bit nervous. I

00:54:18  
don't disagree, but I bet

00:54:20  
it has that. It's part

00:54:21  
of the calculus and we

00:54:21  
have to be, we have

00:54:22  
to know what's happening in

00:54:23  
France was interesting, the French

00:54:25  
ports, frame it. As a



00:54:27

matter of not, not reviewing

00:54:29

the merits of the underlying

00:54:31

award, but but just reviewing

00:54:33

the Conformity of the Year

00:54:35

Award with fresh public policy

00:54:36

and international principles. So it's

00:54:39

not that. There's no Essential

00:54:42

at that. It's not really

00:54:43

about the merits but it's

00:54:44

about conforming to the public

00:54:46

policy principles of the system

00:54:48

in which that award exist.

00:54:49

But are what's happening in



00:55:05

that jurisdiction where you sit

00:55:07

just a logical conclusion, makes

00:55:10

me a bit nervous or

00:55:10

there wouldn't be uniform standard

00:55:12

and perhaps that's part of

00:55:13

what the recommendation of approach

00:55:18

for tracking knows that transcends

00:55:20

Civil War on, you know,

00:55:29

whether any of this has

00:55:39

to Review corruption evidence, particularly

00:55:43

post-award, corruption evidence. So I'll

00:55:46

leave it at that. I

00:55:47

would just make one quick,



00:55:49

it's on the right side

00:55:52

is evolving in the context

00:55:54

of that was something that

00:55:56

we we found interesting. And

00:55:58

in writing this paper, on

00:55:59

the illegality of which was

00:56:00

everything short of corruption where

00:56:03

you, you see, there are

00:56:04

cases where the due diligence

00:56:06

standard to, which the investor

00:56:08

is held, very spry. There's

00:56:10

a strict liability kind of

00:56:12

standard to use your help



00:56:14  
to you. You were supposed

00:56:16  
to have done your due

00:56:16  
diligence and somehow, you were

00:56:18  
also due to make any

00:56:19  
investment. Well, that's too bad.

00:56:20  
You're, you're strictly liable anyway

00:56:22  
and then and others will

00:56:27  
have a very quiet and

00:56:30  
we'll kind of way it

00:56:30  
and besides well, you know,

00:56:32  
you didn't know if you

00:56:33  
didn't do enough, you know,

00:56:34  
you saw this one was,



00:56:35

you didn't see this and

00:56:37

then some Cases that says,

00:56:41

it doesn't even look at

00:56:43

it, just come back in

00:56:55

the context of the effects

00:57:06

of the French. The very

00:57:09

recent friend should approach the

00:57:13

court, the court of appeal

00:57:15

to hear for the first

00:57:17

time allegations of corruption and,

00:57:19

and, and the investigate these

00:57:22

allegations, for the first time

00:57:23

allegations that have not been



00:57:24

heard from the tribunal, I

00:57:28

taste of Killeen mentioned, is

00:57:30

highly criticized Alex has been

00:57:41

her usual. Pedro. What are

00:57:48

your thoughts on these issues

00:57:50

from the world of criminal

00:57:52

and Regulatory enforcement. There was

00:58:01

one in particular that, that

00:58:02

really recorded me, which is

00:58:05

your reference to print sample.

00:58:06

The corruption perception index has

00:58:09

the so-called CPI than any

00:58:11

rate of deck since it's



00:58:12

a very thoughtful word product

00:58:13

from Transparency, International repeated organization

00:58:17

and and I completely get

00:58:20

my the Hardy right. It

00:58:22

I think it provides invaluable

00:58:23

context but it can also

00:58:26

become kind of a ritual

00:58:27

of prejudice or biased. You

00:58:29

say well you know I'm

00:58:31

lazy to say well, look

00:58:33

investment in country X automatically

00:58:35

must be tainted by Copying

00:58:38

setting in our kind of



00:58:39  
criminal enforcement practice it isn't

00:58:41  
an important tool reference. I

00:58:43  
have sat across the table

00:58:46  
from the justice department on

00:58:47  
countless occasions and the discussion

00:58:49  
is off and well, you

00:58:51  
know, hold on. You said

00:58:52  
your clients did this level

00:58:54  
of diligence on your third

00:58:55  
party, but they're operating in

00:58:57  
this market, you know, this

00:58:59  
Market is riskier, right? And

00:59:01  
so there is a certain



00:59:01

element where I get the

00:59:04

popped up the possibility that

00:59:05

its use them properly or

00:59:07

as a lazy short cord

00:59:08

or something. But it's also

00:59:09

a reality of the world.

00:59:09

Almost feels like to borrow

00:59:13

the US, the legal standard

00:59:15

of willful blindness, right? It

00:59:17

almost feels like willfully blind

00:59:19

of an arbitrator, not to

00:59:21

take into account. That there

00:59:23

are certain markets where unfortunately,



00:59:24

no corruption is Joe institutionalized

00:59:28

that it, it feels to

00:59:29

me like that they should

00:59:31

take into account. That is

00:59:32

an investment in X sector

00:59:34

in X country. Should We

00:59:37

get a closer look as

00:59:38

to whether everything was done

00:59:39

a bunk board or not

00:59:41

I get that it's a

00:59:42

very hard issue but I

00:59:43

think that you identified as

00:59:47

an exceptionally helpful tool that



00:59:49

arbitrators could use as a

00:59:50

as a reference. Not a

00:59:52

decisive issue but a reference

00:59:53

the only other come grab

01:00:01

my mobile device us. Aggressive

01:00:04

lawyer. I need to be

01:00:07

more aggressive in in asking

01:00:10

pointed questions and connecting the

01:00:12

dots. I think often times

01:00:14

it in my experience and,

01:00:15

and I'm I'm know, I'm

01:00:17

no expert on arbitration, but

01:00:19

in my experience, arbitrators are



01:00:21

happy to be briefed on

01:00:22

issues. They are happy to

01:00:23

get the mission from the

01:00:24

parties. They're very deferential to

01:00:27

giving both parties a chance

01:00:28

to be heard and all

01:00:28

that. But they don't often

01:00:31

ask they're really harder questions

01:00:33

of connecting the dots. You,

01:00:34

no matter comes to mind

01:00:36

where there are several government

01:00:38

officials that are now under

01:00:40

arrest and they're under arrest



01:00:42  
in a fact pattern that

01:00:42  
is strikingly similar to what

01:00:45  
the claimants have raised. And

01:00:48  
I would love to see

01:00:49  
the arbitrator sit down and

01:00:50  
and just say to that

01:00:52  
particular respondent. Help me out

01:00:54  
here. You know, you say

01:00:56  
there's no corruption but this

01:00:57  
person is under arrest. This

01:00:58  
person is under arrest as

01:00:59  
persons under arrest, and it

01:01:01  
took to give it my



01:01:02

us raise. Make it make

01:01:03

sense for me, and putting

01:01:06

putting parties, whether it's a

01:01:08

claimin, ora, Ora, Ora Ora,

01:01:09

Ora, explain it. I think

01:01:17

is a, is a, you

01:01:18

know, I think that's a

01:01:20

better approach until I would,

01:01:22

I would encourage her to

01:01:23

borrow the old phrase, connect

01:01:26

the dots to 210. Do

01:01:27

that exercise, not just sit

01:01:28

back and wait for some



01:01:29

Olivia cross examination results. Were

01:01:32

they stay naked make sense

01:01:34

because I'm seeing all these

01:01:35

red flags and I want

01:01:37

you guys to answer it

01:01:38

directly for me. Yeah, that's

01:01:43

a very interesting point and

01:01:45

we are at we are

01:01:45

doing extremely well on time.

01:01:46

We do have some questions

01:01:49

from the audience, but picking

01:01:50

up and let Pedro just

01:01:51

said, I'd like to pose



01:01:53

a question to Google add.

01:01:54

Before I turn to the

01:01:55

questions from the audience, which

01:01:56

is what do you do

01:01:59

when you have a situation?

01:02:00

Like, the one that Pedro

01:02:01

has just described or the

01:02:03

one that Athena opposed, which

01:02:05

is neither party is raising

01:02:07

the claim of corruption. But

01:02:10

you have either a situation

01:02:13

where the the officials involved

01:02:16

in the investment have all



01:02:18  
been arrested in another corruption

01:02:21  
scheme. Suggesting that maybe there

01:02:23  
was corruption in this investment

01:02:24  
as well. Or you simply

01:02:26  
have nothing more than the

01:02:29  
corruption index. Suggesting that corruption

01:02:32  
could be present, but neither

01:02:34  
party is Raising it. They,

01:02:35  
they seem to want to

01:02:36  
avoid it in the arbitration.

01:02:37  
So glad what, what do

01:02:39  
you think is the right

01:02:39  
thing to do in that



01:02:40  
situation? Yeah, I mean I

01:02:43  
just one quick when I

01:02:44  
get something on the index

01:02:46  
itself, I think Pedro put

01:02:47  
it well that it makes

01:02:48  
sense to look at it

01:02:49  
as part of a multifactorial

01:02:51  
tester assessment and as a

01:02:53  
Theater award it's not it

01:02:54  
shouldn't be decisive on on

01:02:56  
on the given matter in

01:02:58  
terms of how you would

01:02:59  
proceed in circumstances where neither



01:03:02

party has raised allegations of

01:03:05

corruption. I think that ultimately

01:03:07

will turn on but on

01:03:08

the tribunal so you don't

01:03:09

have to be satisfied of

01:03:11

their own jurisdiction in proceedings.

01:03:13

If they have good reasons

01:03:15

to believe that there was

01:03:16

a risk of corruption at

01:03:17

the time of investment and

01:03:19

therefore they may not have

01:03:20

jurisdiction over the relevant dispute.

01:03:22

They should have their own



01:03:24

initiation look into the matter

01:03:26

and raised the matter because

01:03:28

it's simply not feasible for

01:03:29

me to turn their eyes

01:03:31

away from the possibility that

01:03:33

they don't have jurisdiction over

01:03:34

a given dispute. I mean,

01:03:36

I think that's that's sort

01:03:37

of, where is Pedro? Mentioned

01:03:39

some of the new courage

01:03:41

for a given treadmill, really

01:03:43

hasta to come up? And

01:03:45

I know that. Unfortunately speaking



01:03:46  
frankly can be a bit

01:03:47  
complicated sometimes where we have

01:03:49  
a system that's dependent on

01:03:52  
repeat appointments and so therefore

01:03:54  
you don't always you know

01:03:55  
you fine or betray his

01:03:56  
maybe in certain circumstances hesitant

01:03:58  
to shake the tree a

01:03:59  
little bit. You can imagine

01:04:00  
this is probably one of

01:04:01  
the arguments that people make

01:04:02  
for more permanent eye institution

01:04:05  
to assess investment treaty claims



01:04:07  
but but I think it's

01:04:08  
absolutely fundamental that that's looked

01:04:11  
into Inception. Yeah, that's very

01:04:15  
true and I'm going to

01:04:17  
pose another question for anyone

01:04:18  
who wants to answer it,

01:04:20  
which is in, what do

01:04:21  
you do when there is

01:04:22  
evidence of corruption? That was

01:04:24  
not at the outset, but

01:04:26  
let you know, but has

01:04:28  
arisen during the course of

01:04:29  
the investment is that a



01:04:31  
red flag? That investment that

01:04:33  
corruption could have occurred also

01:04:35  
at the outset or how,

01:04:36  
how else might that impact

01:04:38  
the investment in an arbitration.

01:04:40  
And then also what we

01:04:43  
have seen, tribunal's like the

01:04:45  
one in petrobangla where they

01:04:47  
found that if Brian has

01:04:49  
been paid at the outside

01:04:50  
of the investment but that

01:04:52  
no benefit had had inured

01:04:55  
to the investor and as



01:04:57  
a result they determined that

01:04:59  
they did have jurisdiction on.

01:05:01  
So I guess my question

01:05:02  
to the panelists know what

01:05:05  
what do you do in

01:05:05  
those situations that based on

01:05:07  
the most recent developments that

01:05:09  
we've seen and in France

01:05:11  
and otherwise If I may

01:05:16  
have just come in on

01:05:17  
the last one because it

01:05:18  
doesn't Echo what what we

01:05:20  
saw and Emma versus Croatia,



01:05:21

which is this having to

01:05:23

link from you propose to

01:05:27

bribe? You investor bribed ex-official

01:05:32

successfully in order to get

01:05:33

in return. A benefit wish

01:05:35

you didn't receive because of

01:05:37

the narrative and so I

01:05:41

could see if you followed

01:05:42

that kind of height and

01:05:44

standard and Analysis saying well

01:05:47

you didn't actually you're successful

01:05:49

and your bribe. So there

01:05:51

is there's no completion of



01:05:53  
the she followed that line

01:05:57  
of thinking and there's no

01:06:00  
there's no but I know

01:06:04  
that's right, we can debate

01:06:05  
that but it certainly sounded

01:06:07  
to me a lot like

01:06:08  
this heightened causal cause a

01:06:10  
causal link chain. If I

01:06:16  
can just offer a brief

01:06:17  
comments on that one lawyer

01:06:23  
happier on. But under us

01:06:24  
law particular Foreign Corrupt Practices

01:06:26  
Act which is the law



01:06:27

that governs bribery of non

01:06:29

US government officials and offer

01:06:32

or a promise to pay

01:06:33

whether or not he pain.

01:06:34

Is, is considered by a

01:06:36

payment, an author of promise

01:06:38

to pay whether or not

01:06:39

you receive what you bargained

01:06:41

for is still write under

01:06:42

us walk. So I think

01:06:44

it is again for my,

01:06:45

for my option, practitioner perspective,

01:06:49

anti-corruption anti-corruption practitioner perspective, if



01:06:55  
you go to and you

01:06:56  
promised that someone will approach

01:07:02  
a public procurement officer at

01:07:05  
Ministry of whatever and say,

01:07:07  
if you get me this

01:07:08  
contract, I will get you

01:07:09  
X. If I'm awarded I'll

01:07:11  
cut your back, 10%. Got

01:07:13  
me a promise or offer

01:07:15  
that you will pay in

01:07:16  
the event that you're actually

01:07:17  
granted. That contract is a

01:07:19  
bright. So that's different. Perhaps



01:07:23

and in the arbitration you

01:07:24

were the one on the

01:07:26

US perspective. Comments on recent

01:07:40

case, but he's applying the

01:07:41

standard. That's a very old

01:07:44

standard kind of. All right.

01:07:46

Listen to tell me my

01:07:47

we visit very, very high

01:07:49

standard for finding corruption. We

01:07:54

no longer receiving. I'm in

01:07:56

the truck now, seek more

01:07:59

to to investigate there. The

01:08:01

cases and exactly the other



01:08:03  
point is that if we

01:08:04  
we searched to find, always

01:08:06  
a causal link between everything,

01:08:07  
and we just don't follow

01:08:11  
the definition of corruption as

01:08:13  
it appears today in international

01:08:15  
conventions and another instruments. Yeah,

01:08:21  
I think that's exactly, right.

01:08:23  
And this also, we had

01:08:24  
a question from the audience

01:08:26  
about whether non-financial benefits given

01:08:30  
to government officials, could constitute

01:08:34  
corruption and international arbitration. And



01:08:36

I think everything we just

01:08:37

discussed really responds to that.

01:08:39

I'm going to go now

01:08:40

to a another question that

01:08:43

we have from the audience

01:08:43

which is if the corrupt

01:08:45

acts has taken place outside

01:08:46

of the host 8eg payments

01:08:49

into offshore accounts, would there

01:08:51

be any impact on the

01:08:52

applicable law to determine if

01:08:54

corruption occurred and would host

01:08:56

state laws? Must be relevant



01:08:57

and so maybe pay through.

01:09:00

I see if not, I'm

01:09:01

going to go to you

01:09:01

first from the criminal perspective

01:09:03

because I think the answer

01:09:05

is probably similar, but somewhat

01:09:08

with 70 wants, two differences

01:09:10

between the two areas of

01:09:12

law. Would look at it

01:09:21

more. As was, it was

01:09:23

it a corrupt back in

01:09:24

relation to the investigation right

01:09:26

often times by definition, it



01:09:28

will be an offshore act

01:09:29

because it's moving money offshore

01:09:31

and stuff. From a different

01:09:34

perspective, frankly are our friends

01:09:35

of the justice department are

01:09:37

quite creative in finding a

01:09:39

way to say that. It

01:09:39

was an act that touch

01:09:40

the us, whether it was

01:09:42

a transaction into bank accounts

01:09:44

and happened to be denominated

01:09:45

in US dollars or that

01:09:47

went through a server in



01:09:47

the US, the jurisdiction part

01:09:50

from a criminal perspective almost

01:09:51

becomes easier, but I think

01:09:55

it would be is it

01:09:58

or corruption or this kind

01:10:00

of money laundering stores in

01:10:01

rubber case, maybe that is

01:10:02

a wedge in relation to

01:10:03

the investment at the issue.

01:10:05

And I think if, if

01:10:06

the answer is yes, then

01:10:07

again, my own ignorance. Barbra

01:10:10

Streisand. I don't I don't



01:10:11  
see how that would necessarily

01:10:12  
change the count. This much.

01:10:16  
Yeah, I mean I just

01:10:17  
from my perspective, I guess

01:10:19  
there is there's the whole

01:10:21  
state law requirements. Most instances

01:10:24  
we mention of some Modern

01:10:26  
crushin walls will have some

01:10:28  
extra territory affect, right? So

01:10:31  
for example, under the UK

01:10:32  
bribery act bribery or corruption,

01:10:36  
that takes place by anyone

01:10:37  
linked to the UK, whether



01:10:39

it's a resident or national,

01:10:40

and it's against their foreign

01:10:41

officials will be captured as

01:10:43

well. Because naturally, these schemes

01:10:45

are organized and in very

01:10:47

convoluted and Austin extraterritorial manner.

01:10:49

But even let's say for

01:10:52

a moment that the relevance

01:10:55

of local laws and regulations,

01:10:56

don't capture such conduct. As

01:10:59

I mentioned earlier, it's not

01:11:00

simply in cases where has

01:11:03

been required to comply with



01:11:04  
local laws and regulations that

01:11:05  
crushes down to deprive? The

01:11:07  
tribunal of of jurisdiction there

01:11:09  
is also a Reliance on

01:11:10  
more general principles of good

01:11:12  
faith in otherwise. So it

01:11:14  
hasn't always been the case

01:11:15  
that has been reliance. Express

01:11:17  
treaty language. So that would

01:11:19  
certainly cut across it as

01:11:20  
well. That makes sense that

01:11:26  
we have a comment about

01:11:28  
the fact that there's not



01:11:30  
a widely accepted definition of

01:11:31  
corruption and international treaties. I

01:11:34  
think maybe I'd like to

01:11:35  
go to you because you

01:11:36  
spoke a little bit about

01:11:36  
where tribunal's may look to

01:11:39  
find both guidance on the

01:11:42  
definition of corruption and on

01:11:45  
red flags, you know what,

01:11:47  
where do you think tribunal

01:11:48  
should look for this definition?

01:11:49  
And is there, is there

01:11:51  
a good definition that works



01:11:53

across International arbitration and in

01:11:56

particular across investment arbitration? You're

01:12:00

assuming I hadn't eaten in

01:12:04

the question as to what

01:12:09

no reply to the existence

01:12:12

of notes of corruption. Is

01:12:16

not linked with necessarily with

01:12:18

the whole states. L, o,

01:12:20

i mean that provides us

01:12:29

together as to what is

01:12:30

the corruption and can you

01:12:32

connect to National instruments? Instruments,

01:12:41

be signing corruption themselves. But



01:12:45  
don't play instruments. Providing assistance

01:12:49  
to arbitrators and and, and

01:12:52  
empathy sand companies with regard

01:12:55  
to what kind of practices

01:12:57  
are to be considered as

01:12:58  
Corrupt Practices. I don't think

01:13:00  
that an arbitrator specifically refer

01:13:02  
21 convention would rather that

01:13:06  
she or he would rather

01:13:07  
look at more than one

01:13:09  
instruments in that regard. Yeah

01:13:13  
but I think that's right

01:13:14  
I mean there isn't it's



01:13:16

going to depend on the

01:13:18

treaty that is governing the

01:13:20

dispute as well as many

01:13:22

other factors what a tribunal

01:13:23

is going to look at

01:13:24

in that situation. And if

01:13:26

anyone else wants to add

01:13:27

anything on that but otherwise

01:13:28

I think we have made

01:13:30

very good time here today.

01:13:31

So let me just see

01:13:33

the do any of the

01:13:35

coke analysts have anything they'd



01:13:36

like to add. You're hearing

01:13:41

nothing and seeing, No Hands.

01:13:43

Thank you so much to

01:13:45

everyone for your time today.

01:13:47

And for joining us, it's

01:13:49

been super interesting and engaging.

01:13:50

I think one of the

01:13:52

recurring themes that we heard

01:13:53

throughout this morning, / afternoon,

01:13:57

slash evening panel, depending on

01:13:59

where you are, is that

01:14:01

this is such a huge

01:14:02

topic with so many different



01:14:04  
aspects to be discussed and

01:14:06  
with cross over to other

01:14:08  
areas of law and it's

01:14:09  
very difficult to address everything

01:14:12  
comprehensively in an hour and

01:14:15  
15 minutes. So we are

01:14:17  
very happy to be joining

01:14:18  
all of our. All of

01:14:21  
the people who have joined

01:14:21  
us today and our breakout

01:14:23  
rooms for another short discussion

01:14:25  
of corruption. But of course,

01:14:28  
this is a discussion that



01:14:29

could continue all day long

01:14:31

and for the rest of

01:14:32

the week and we still

01:14:33

probably would not have covered

01:14:34

it, but thank you so

01:14:35

much and thank you again

01:14:36

to Jose Antonio and Ian

01:14:39

and Tamara. Lucia, who has

01:14:41

been very helpful in collecting

01:14:42

all of the questions and

01:14:44

dealing with all of the

01:14:45

technology during this time, Thank

01:14:49

you very much, a rainbow



01:14:50  
and thank you very much

01:14:52  
to Colleen and Athena Pedro.

01:14:55  
And thank you so much

01:14:58  
because this, this, this has

01:15:00  
been sort of an exemplary

01:15:01  
panel and in both the

01:15:03  
substance and format and timing

01:15:05  
show. No, kudos to everyone

01:15:08  
of you, I believe that

01:15:09  
you have done an incredible

01:15:12  
job. I I would like

01:15:13  
to to put this as

01:15:15  
an example of a great



01:15:16

panel in terms of of

01:15:17

the presentation initially Which Wich

01:15:21

did an update of what

01:15:24

has been going on in

01:15:25

the past year and then

01:15:26

the various issues on on

01:15:29

corruption the relation with with

01:15:32

the the requirement to comply

01:15:35

with applicable or than issues,

01:15:38

with respect to public policy,

01:15:40

International public policy and and

01:15:42

and and good faith Etc

01:15:44

and and then the standard



01:15:46  
of proof and then from

01:15:48  
a The perspective that perhaps

01:15:50  
in a corruption might need

01:15:52  
a more active or or

01:15:55  
connecting the dots by the

01:15:57  
arbitrator's suggestion. So thank you

01:16:01  
so much. Now it may

01:16:02  
be time to move on

01:16:03  
to the breakout rooms, we

01:16:06  
have time to do that.

01:16:07  
We would love you to

01:16:09  
stay on for those that

01:16:11  
may be interested. And Matt



01:16:12

Lucia will send us to

01:16:14

the breakout rooms and then

01:16:15

there's no obligation to talk

01:16:19

about anything substantive in the

01:16:21

breakout rooms. We offer that

01:16:22

space because, of course, we

01:16:24

are in the world and

01:16:25

people are maybe not freak

01:16:27

on me, being in the

01:16:28

states, that maybe number in

01:16:29

the Americas except Carmen Asia.

01:16:31

And I need to wait

01:16:32

to connect with the with



01:16:33  
the rest of the world.

01:16:34  
So thank you. And let's

01:16:36  
take it away from for

01:16:37  
the, for the breakroom. Thank

01:16:39  
you. And thank you, Raymond

01:16:52  
for moderating. It was up

01:16:53  
timely tight ship. Thank you.

01:16:58  
I didn't mean to cut

01:16:59  
anyone off you. Welcome. This

00:00:20  
is World arbitration update. This

00:00:24  
is our third day of

00:00:25  
a Six-Day experience and during

00:00:29  
the first two days, we



00:00:30  
had an emphasis in the

00:00:32  
Americas. And we had the

00:00:33  
eight. We actually had eight

00:00:36  
panels stations in person from

00:00:40  
Mexico City and today is

00:00:42  
Africa day and we are

00:00:45  
addressing various topics. And today's

00:00:48  
panel a war or the

00:00:49  
panel. Now, it's called corruption

00:00:52  
in investment products. The standard

00:00:55  
of proof and the consequences

00:00:57  
for investment arbitration. As one

00:00:59  
of the features of a



00:01:01  
world of attrition update, we

00:01:04  
follow the schedule of the

00:01:07  
region that were focusing on.

00:01:10  
So for those of you

00:01:12  
who are in the US

00:01:14  
are session started at 7

00:01:17  
a.m. Because we're following Africa,

00:01:19  
schedule. Not being said, it

00:01:22  
is my pleasure to introduce

00:01:23  
rainbow Willard, who is counsel

00:01:28  
an arbitrator, and who has

00:01:31  
that for more than 10

00:01:33  
years at work on complex,



00:01:35

International commercial, and investment, treaty

00:01:39

arbitrations under all of the

00:01:41

major International rules, including the

00:01:43

ICC on to draw it.

00:01:45

Exit, at cetera, rainbow has

00:01:47

particular experience in energy oil,

00:01:49

and gas and Mining dispute

00:01:51

involving parties from Latin America,

00:01:53

South Asia, Europe, and the

00:01:56

Middle East. Prior to forming

00:01:58

her own practice, rainbow with

00:02:00

counsel, at leading international. District,

00:02:03

Boutique at Chaifetz Lindsay in



00:02:05

York and was a senior

00:02:07

associate in the international arbitration

00:02:09

group of Allen & overy.

00:02:12

Practicing in London and New

00:02:14

York at both firms. Rainbow

00:02:16

LED team in significant International

00:02:18

commercial disputes and represented States

00:02:21

and investors in case has

00:02:22

governed by investment treaties or

00:02:25

trade agreements, Rainbow Dash, Rainbow

00:02:27

has extensive oral and written

00:02:29

advocacy experience in English and

00:02:31

Spanish and is equally comfortable



00:02:32  
at arbitrator and Council in

00:02:35  
both languages. So I could

00:02:38  
say way way more, but

00:02:40  
I don't think that she

00:02:41  
will, she would appreciate it.

00:02:42  
So rainbow you have to

00:02:44  
store it and it's a

00:02:45  
pleasure to have each one

00:02:46  
of you here. So, welcome

00:02:49  
to Wildwood out. Thank you

00:02:51  
so much. Jose, Antonio and

00:02:53  
thank you, Ian. Also, I'm

00:02:55  
so pleased to be able



00:02:56

to take this virtual trip

00:02:58

around the world with the

00:02:59

world arbitration update and we're

00:03:02

very grateful to the organizers.

00:03:04

For what is a really

00:03:05

great initiative and for inviting

00:03:08

me and all of these

00:03:09

Stellar panelist to be a

00:03:11

part of We have a

00:03:13

group of really incredible practitioners

00:03:16

and experts here today, who

00:03:18

put a lot of work

00:03:19

into preparing. But I think



00:03:21  
is going to be an

00:03:22  
extremely engaging and informative panel

00:03:25  
and I'm going to introduce

00:03:26  
them. I'm going to go

00:03:28  
by first name, alphabetical order

00:03:30  
just to mix things up

00:03:33  
a bit. So first, we

00:03:34  
have Athena fouchard. Papa, who

00:03:38  
is an arbitrator based in

00:03:39  
Paris. She has significant experience

00:03:41  
in arbitrations involving States and

00:03:44  
state entities, as well as

00:03:45  
an arbitration with a link



00:03:47

to the African continent before,

00:03:49

establishing her own practice. Last

00:03:51

year, Athena worked an international

00:03:53

arbitration Departments of Major law

00:03:55

firms for more than 15

00:03:57

years. She is a member

00:03:59

of the ICC arbitration commission

00:04:01

and a founding member of

00:04:03

Africa, carb Athena is a

00:04:05

Greek national and she handles

00:04:07

arbitrations in English. French, and

00:04:09

Greek. Next, we have Colleen

00:04:12

Malala. Who is a partner



00:04:13

at Chavis Lindsay LLP in

00:04:15

New York, where she represents

00:04:17

clients in international commercial arbitration

00:04:19

and an investment disputes telling

00:04:22

counsels clients and an array

00:04:24

of multi jurisdictional disputes that

00:04:26

spanned the globe and concern,

00:04:28

such sectors, as oil and

00:04:30

gas. Mining consumer goods and

00:04:32

Telecommunications Cullen has acted as

00:04:34

counsel in arbitration is conducted

00:04:36

in English and French and

00:04:38

administered by all major arbitral



00:04:40  
institutions Helene serves as vice-chair

00:04:43  
of the steering committee of

00:04:44  
the ICC Commission on arbitration

00:04:46  
and a tiara. And she

00:04:48  
is the steering committee liaison

00:04:50  
to the ICC task force

00:04:51  
on addressing corruption issues. Killeen

00:04:54  
also serves as co-chair of

00:04:55  
the IV a investment arbitration

00:04:57  
subcommittee and is a member

00:04:59  
of the IBA arbitration committee

00:05:01  
has passports on privilege tell.

00:05:03  
He was recently awarded the



00:05:04

12th annual Schmitt, lowenfeld prize

00:05:07

for an article, she published

00:05:08

along with Jessica, be some

00:05:10

croston on the illegality of

00:05:12

Action and investor-state arbitration. So

00:05:15

she is an expert. Not

00:05:16

just on corruption and investment

00:05:18

arbitration. But on the illegal

00:05:20

act ugly gallatly objection, writ

00:05:22

large. And the many reasons

00:05:23

that it can be asserted

00:05:25

next coming from London, I

00:05:28

believe you're in London today.



00:05:29

Glad is that right? Okay,

00:05:32

don't have a good lad,

00:05:33

you're still yourself who is

00:05:35

a partner and Alan and

00:05:36

ovaries, International arbitration group and

00:05:39

a member of the ICC

00:05:40

International Court of arbitration and

00:05:42

the ICC Africa commission. He

00:05:44

was also appointed to the

00:05:46

exit panel of conciliators by

00:05:48

the federal republic of Somalia.

00:05:50

Glad has significant experience, representing

00:05:53

companies, governments and international organizations



00:05:57

and institutional, and ad hoc

00:05:59

arbitral proceedings, including arbitrations under

00:06:03

the ICC Ica, exit and

00:06:06

unseat real rules. And finally,

00:06:08

last but not least, we

00:06:09

have Pedro Soto, who is

00:06:11

of counsel here in Washington

00:06:12

DC at Gibson, Dunn &

00:06:15

Crutcher, Pedro is a member

00:06:17

of the white-collar criminal defense

00:06:19

and investigations group and his

00:06:21

practice focuses on anti-corruption cases,

00:06:24

brought by us authorities and



00:06:25  
other enforcement agencies around the

00:06:27  
world. He has experience and

00:06:29  
anti-corruption matters and more than

00:06:31  
two Two dozen countries with

00:06:33  
a particular focus on Latin

00:06:35  
America. Pedro also has acted

00:06:37  
as counsel to States and

00:06:39  
private claimants and more than

00:06:40  
10 arbitrations under the exit

00:06:42  
to exit additional facility and

00:06:45  
the ICC rules. Finally, I

00:06:47  
know that we had published

00:06:49  
that David Koch Vani who



00:06:50

is counsel, at Levi Kaufman,

00:06:52

polar and Geneva was going

00:06:53

to join us today. Unfortunately

00:06:55

he got a last-minute personal

00:06:56

issue that made his participation

00:06:58

and impossible and we're very

00:07:00

sorry that he's unable to

00:07:02

be here today. Now, for

00:07:04

those of you who have

00:07:05

never joined a world, arbitration

00:07:07

update session before, I'm going

00:07:09

to tell you a little

00:07:10

bit about the structure before



00:07:11

we get started. First we're

00:07:13

going to hear from Colleen.

00:07:14

Who's going to give us

00:07:15

an update on the key

00:07:16

developments from tribunal's and courts

00:07:18

on the issue of corruption

00:07:20

and investment arbitration over the

00:07:22

last year. After that, each

00:07:24

of our panelists is going

00:07:25

to address specific legal, and

00:07:27

practical topics that have arisen,

00:07:29

when corruption claims are asserted

00:07:31

and investment arbitration, and there



00:07:33

will then be some discussion

00:07:35

on each of these points

00:07:36

with Arco panelist. Everyone who's

00:07:39

attending. We are so happy.

00:07:40

You are here today and

00:07:42

we are here really for

00:07:43

you so you are welcome

00:07:44

to submit questions throughout the

00:07:46

session in the chat and

00:07:48

we will save time at

00:07:49

the end to address your

00:07:50

questions. If we don't have

00:07:52

time to address, every question



00:07:54  
that we receive in the

00:07:55  
chat, there will be a

00:07:56  
breakout session at the end

00:07:57  
with networking, and you will

00:07:58  
have the opportunity to meet

00:08:00  
and ask questions of at

00:08:02  
least one of the panelists

00:08:04  
and your breakout room. So,

00:08:06  
without further ado, I would

00:08:08  
like to turn it over

00:08:09  
to Colleen to give us

00:08:10  
some updates on what's been

00:08:11  
going on in the world



00:08:12  
of corruption and investment arbitration

00:08:15  
over the last year. Thank

00:08:18  
you, rainbow, for your warm.

00:08:19  
Welcome. Thank you again until

00:08:21  
10 Tony other organizers for

00:08:22  
inviting me to join you.

00:08:24  
Today, I'm very much looking

00:08:25  
forward to our panel discussion

00:08:27  
and your questions. So, as

00:08:30  
rainbow said, my task today

00:08:31  
is to give you an

00:08:32  
update on corruption related, developments

00:08:34  
and investment arbitration in the



00:08:36  
past year and to do

00:08:37  
so in age of 10

00:08:38  
minutes, so I will focus.

00:08:41  
My remarks on two main

00:08:43  
issues on the first is

00:08:45  
the standard of proof of

00:08:46  
corruption. And the second is

00:08:48  
French exceptionalism. So, starting with

00:08:51  
the standard of proof of

00:08:52  
corruption there, two schools of

00:08:54  
thought in that regard first,

00:08:56  
is that the same standard

00:08:58  
of proof that applies to



00:08:59

all other claims should also

00:09:01

apply to corruption. And the

00:09:03

second school of thought is

00:09:04

that there should be a

00:09:04

height and standard. And if

00:09:06

we look back at the

00:09:07

case in the past year,

00:09:08

we have examples of each

00:09:09

one. So, let's start with

00:09:11

the school of thought that

00:09:13

says, that there should be

00:09:14

the same standard of proof

00:09:15

of corruption as there is



00:09:16  
for other claims and the

00:09:17  
basis for that. For that

00:09:19  
position, is that corruption is

00:09:21  
very hard to prove and

00:09:24  
by its very nature. And

00:09:25  
so it would be unfair

00:09:26  
to impose on a party.

00:09:28  
A hiding burden of proof

00:09:29  
and having a standard person

00:09:30  
to me to meet at

00:09:32  
2 to make out corruption.

00:09:33  
And this sound proof takes

00:09:36  
his formulation. Sometimes it's talked



00:09:39

about as the balance of

00:09:40

probabilities, reasonable certainty, personal conviction

00:09:44

preponderance of the evidence are

00:09:46

various ways to say the

00:09:47

same thing, but essentially, it's

00:09:49

that it's more likely than

00:09:50

The crash happened and that

00:09:52

is sort of the same

00:09:52

standard of proof to prove

00:09:55

other claims and we see

00:09:57

this and any case which

00:10:03

technically is not a treaty

00:10:05

case but it is it



00:10:06

does involve estate and there's

00:10:07

an exit arbitration and I

00:10:09

think it's it's quite helpful

00:10:10

to illustrate this point. In

00:10:13

that case, the claimants had

00:10:14

argued that their Mining rights

00:10:15

had been revoked unlawfully because

00:10:17

they refused to participate in

00:10:20

a bribe and they were

00:10:21

supposed to make a bribe

00:10:22

payments. And in fact, he

00:10:24

argued that these rights were

00:10:26

precisely because there was overwhelming



00:10:28

evidence that the Mining rights

00:10:29

were obtained through corruption and

00:10:31

bribery of public officials including

00:10:34

the president's, the then, president

00:10:36

fourth wife, The tribunal concluded

00:10:39

that the claims were inadmissible

00:10:40

because of corruption and his

00:10:42

meddling in the acquisition of

00:10:44

the claimants Mining rights and

00:10:46

getting. So here are a

00:10:47

few take away from that

00:10:49

case. First, the tribunal look

00:10:51

to international law and the



00:10:53

practice of international tribunals to

00:10:55

determine the applicable standard of

00:10:57

proof. Second, it recognized that

00:11:00

there are two schools of

00:11:01

thought. And then before it

00:11:03

actually done rejected, the height

00:11:05

and standard of proof for

00:11:06

corruption, allegations precisely, because corruption

00:11:09

itself is difficult to prove,

00:11:10

I'd reasonable certainty and personal

00:11:16

conviction and looks and also

00:11:19

stated that corruption can be

00:11:20

proven by circumstantial evidence or



00:11:22

red flags, interesting. Tidbits, the

00:11:25

tribunal dealt with this as

00:11:27

an objection to admissibility without

00:11:29

discussion. Actually, which is interesting

00:11:32

since typically corruption in the

00:11:34

making of the investment is

00:11:36

usually treated as a jurist.

00:11:37

No question. And I think

00:11:39

that is probably going to

00:11:40

dress up in a bit.

00:11:40

So I won't, I won't

00:11:42

say much more than that

00:11:43

at this point. So that's



00:11:46  
the first rule of thoughts

00:11:46  
of thought, height and standard.

00:11:48  
And the idea behind. Is,

00:11:51  
there's a due to the

00:11:52  
gravity of the charge and

00:11:54  
the gravity of the consequences

00:11:55  
basically, the clan gets gets

00:11:57  
dismissed, there should be a

00:12:00  
height and standard of proof.

00:12:01  
And oftentimes tribunal to adopt

00:12:03  
this philosophy of this approach

00:12:05  
will quote, judge Higgins, separate

00:12:07  
opinion in the oil platforms,



00:12:08

that case, where she said

00:12:10

that the grave of the

00:12:11

charge, the more confidence must

00:12:12

there be in the evidence

00:12:13

for light on. So it's

00:12:15

this idea that's because it's

00:12:17

so such a such a

00:12:19

grave accusation with very serious

00:12:22

consequences. It should be demonstrated

00:12:24

to a height and standard.

00:12:25

There is again. Also there

00:12:27

is formulations from tribunals, you'll

00:12:29

hear clear and convincing evidence



00:12:31

to the most rigorous level

00:12:33

of proof of high threshold

00:12:34

need for solid and persuasive.

00:12:37

These are different ways of

00:12:39

saying. The same thing in

00:12:40

terms of it requires a

00:12:42

height and standard and one

00:12:44

of the cases where there

00:12:51

were allegations that LOL have

00:12:52

procured and you benefits by

00:12:55

bribing, the van Croatian Prime

00:12:57

Minister, incidentally was subsequently convicted

00:13:01

on charges for accepting bribes.



00:13:03

The corruption allegation was rejected

00:13:06

and hear interesting to BSG

00:13:10

resources before the tribunal didn't

00:13:15

acknowledge that. There were two

00:13:16

schools of thoughts with respect

00:13:18

to the standard of proof.

00:13:19

Instead, it refer to the

00:13:21

cases that adopted a high

00:13:23

level of proof and then

00:13:25

characterize this standard as having

00:13:27

quote wide-ranging, unanimity of approach.

00:13:30

So it, it seemed to

00:13:32

think that you would always



00:13:34

apply a higher height and

00:13:36

standard to corruption Allegations. And

00:13:39

then and the way that

00:13:41

a phrase, it was like,

00:13:42

Russia must be established quote

00:13:43

to an appreciably higher standard

00:13:45

than a mere balance of

00:13:46

probabilities. One interesting tidbit about

00:13:51

that case, in addition goes

00:13:53

beyond the Senate approve. It

00:13:54

also how to prove it

00:13:55

and the tribunal said that

00:13:57

it would rely primarily on



00:13:58

for the provable fact that

00:14:01

it was open to resorting

00:14:02

to inferences to fill any

00:14:04

evidentiary jobs only if the

00:14:06

Gap was unavoidable and the

00:14:08

inference was compelling. So, again,

00:14:11

kind of reiterates, this height

00:14:13

and standard that we want

00:14:14

to be able to prove

00:14:15

corruption to the extent. We

00:14:16

can't, we'll do inferences but

00:14:18

only if we have to

00:14:19

and only if the inference



00:14:20  
is compelling another point, that

00:14:23  
the tribunal was very keen

00:14:25  
on, was a causal link

00:14:26  
between the corrupt activities and

00:14:29  
the contractual agreements that issue.

00:14:31  
So it's not enough that

00:14:32  
there's evidence of some kind

00:14:33  
of bribery. It also needs

00:14:34  
to have been to have

00:14:37  
in Juice the outcome of

00:14:39  
getting the contract. So there

00:14:40  
has to be a link

00:14:41  
from the corrupt act to



00:14:43

the agreement. A tissue So

00:14:46

she takeaways from these cases.

00:14:49

For the past year, I

00:14:51

would say they're 21 is

00:14:52

the applicable standard of proof

00:14:54

of corruption remains an open

00:14:55

issue despite what the tribunal

00:14:58

seem to say. And I

00:15:00

think it's, it's still open,

00:15:01

whether it's a regular standard

00:15:03

of proof for the standard.

00:15:08

And then the second point

00:15:10

would be that the tribunals



00:15:11  
will look at circumstantial evidence

00:15:13  
and red flags when there

00:15:15  
is no direct evidence of

00:15:16  
corruption. But they'll insist on

00:15:18  
this causal link between the

00:15:19  
crop top and the contracts

00:15:21  
that issue. So that was

00:15:24  
my first point. Second point

00:15:25  
is, I'm running out of

00:15:25  
time, French exceptionalism. And this

00:15:28  
is in the context of

00:15:29  
Court, decisions on corruption and

00:15:31  
set aside proceeding, I will,



00:15:33

I know we're going to

00:15:35

Tina's going to touch on

00:15:36

this at the end. So,

00:15:37

I'm just going to put

00:15:37

down a marker for now,

00:15:38

and just give you the

00:15:41

highlights on the key. Takeaways,

00:15:43

the cases are referring to

00:15:44

here are mainly, Bella. Congress

00:15:47

is Kyrgyzstan Central vs? Gabon

00:15:49

and score like versus Libya,

00:15:50

and which are all set

00:15:52

aside cases. I also drop



00:15:54

a footnote to abl versus

00:15:56

alstom that Saga, which there

00:15:58

was a recent about much

00:15:59

and 1/8 in March of

00:16:01

this year, but that was

00:16:02

in the important contacts. But

00:16:04

I think bottom line is,

00:16:05

the underlying premise, is that

00:16:08

a French court has to

00:16:10

assess the effect that upholding

00:16:12

or enforcing in the ward

00:16:13

may have on the French

00:16:14

public order and international public



00:16:16  
policy. And if we, if

00:16:18  
it would be contrary to

00:16:19  
French public policy than the

00:16:20  
award should not be upheld

00:16:22  
or For static equilibrium. And

00:16:26  
so given this directive the

00:16:28  
French judge, it needs of

00:16:29  
the French touch can do

00:16:30  
the following, it can make

00:16:33  
its own his or her

00:16:34  
own, this assessment of the

00:16:35  
correction evidence that was presented

00:16:37  
to the tribunal the front



00:16:39  
stretch can reach different conclusions

00:16:40  
from the tribunal. So it's

00:16:42  
a de novo review of

00:16:43  
the corruption evidence that was

00:16:45  
presented in the arbitration and

00:16:47  
Beyond. Actually, the French touch.

00:16:50  
Can also consider poster board

00:16:52  
evidence and making his or

00:16:53  
her assessment. So I've been

00:16:54  
as I was never presented

00:16:55  
to the tribunal so that's

00:16:58  
a, I'll leave it at

00:17:00  
that. I'll just add one



00:17:01

foot notes about the court

00:17:02

of cassation confirming. That the

00:17:04

applicable standard is, the evidence

00:17:06

has to be serious precise

00:17:08

and consistent for corruption to

00:17:10

be found. And I'll stop

00:17:12

there and leave you hanging,

00:17:13

so we can resume the

00:17:14

conversation. When is he not

00:17:16

text? Mike, thank you very

00:17:17

much. Thank you so much,

00:17:20

Killeen for meeting and exceeding.

00:17:23

What seems like it was



00:17:25

going to be an impossible

00:17:26

challenge of giving us a

00:17:28

very informative and comprehensive update

00:17:31

of what has gone on

00:17:32

over the past year. It

00:17:34

seems like tribunal's have really

00:17:36

struggled with what to do

00:17:37

with corruption claims in this

00:17:39

context and then boards have

00:17:41

struggled with how to address

00:17:43

what you're doing. And to

00:17:45

give us some more information

00:17:46

about some of the legal



00:17:48  
aspects of corruption claims that

00:17:50  
tribunal is have struggled with

00:17:52  
and have addressed. We're going

00:17:53  
to go to Google and

00:17:54  
so glad, I'll turn it

00:17:56  
over to you. Thank you

00:17:58  
very much rainbow and thank

00:18:00  
you very much is 2

00:18:01  
to the organized as well

00:18:02  
and truly a pleasure to

00:18:03  
be here with my co

00:18:04  
panelist just by way of

00:18:07  
overview, I'm corruption. All this



00:18:09  
is explained raises complex issues

00:18:13  
of public policy and specific

00:18:15  
in the context of investment

00:18:16  
treaty claims jurisdiction. Admissibility not

00:18:19  
the least. Because by definition,

00:18:20  
an additional Nexus between the

00:18:23  
investor in the state. Name

00:18:24  
of the state's participation is

00:18:26  
implicit in the very nature

00:18:27  
of corruption. So, generally the

00:18:29  
focus and investment treaty claims,

00:18:31  
don't corrupt acts perpetrated by

00:18:32  
the investor. It's important to



00:18:34

be cognizant of the complicity

00:18:35

of station in the alleged

00:18:36

acts of corruption there. Also,

00:18:39

competing values of play here

00:18:40

on the one hand, the

00:18:41

desirability of giving effect to

00:18:43

the public policy against enforcement

00:18:45

of crap transactions on the

00:18:47

other, the public policy of

00:18:48

sustaining International arbitration agreement contain

00:18:51

with an investment treaties and

00:18:52

ensuring the states are not

00:18:53

able to profit from their



00:18:55

own misconduct. Clear that transactions

00:18:59

involving the corruption of public.

00:18:59

Officials are violation of international

00:19:01

public policy International Community, has

00:19:04

a direct interest in combating

00:19:05

corruption at all levels. The

00:19:07

Seminole State and of this

00:19:08

principle was made by judge

00:19:10

lagergren in a 1963 ICC

00:19:13

case in which your marker,

00:19:15

that's Corrections and international legal.

00:19:17

It's contrary to good morals

00:19:18

and to International public policy,



00:19:20

the community of Nations So,

00:19:23

turning to one of the

00:19:24

key questions that I'll be

00:19:26

covering today. What are the

00:19:27

consequences for the arbitration of

00:19:29

the alleged corrupt acts taking

00:19:31

place in the outside investment,

00:19:33

or when the investment was

00:19:34

already operating. So I can

00:19:36

get that background, we can

00:19:38

move to consider the specific

00:19:40

consequences. As I mentioned, are

00:19:42

too interconnected issues to Grapple



00:19:43  
with hear. The first of

00:19:45  
the temporal one, we need

00:19:46  
to address at one point

00:19:47  
in time. The alleged corruption,

00:19:48  
contaminates, the investment, the second

00:19:50  
issue is an interpretive, one

00:19:52  
relating to the specific language

00:19:53  
of the treating question on

00:19:55  
whether there's a requirement that

00:19:56  
the investment is made in

00:19:57  
accordance with the laws of

00:19:58  
the host. So the first

00:20:01  
situation that falls to be



00:20:02

considered is where the relevant

00:20:03

investment treaties specifies. As many

00:20:06

do that the investment should

00:20:07

have been made in accordance

00:20:08

with the laws and regulations

00:20:09

that hosted. An alleged corruption

00:20:11

took place at the outset

00:20:13

or establishments of the investment.

00:20:16

This obviously creates jurisdictional difficulties

00:20:19

for investors as big as

00:20:20

acts of corruption, will almost

00:20:21

always be Malaysia, post States

00:20:23

laws. Investment tribunal certificate. We



00:20:27

interpreted such requirements to be

00:20:28

an issue of jurisdiction in

00:20:30

Selene Morocco. The tribunal State

00:20:33

at the relevant Claus in

00:20:34

Italy. Morocco b i t

00:20:35

sought to prevent the treaty

00:20:37

from protecting Investments, that should

00:20:39

not be protected because they

00:20:40

would be legal. A similar

00:20:42

approach was taken in front

00:20:43

door Philippines, where it was

00:20:45

found that investment, apply the

00:20:46

laws of the host State



00:20:47  
at the time. It's made

00:20:49  
in order to get 40

00:20:50  
protection, however, the distinction between

00:20:53  
a legality of the outset

00:20:54  
or the time of Investments

00:20:56  
and supervening legality occurring, when

00:20:58  
the investment had already, been

00:21:00  
made remarkable for the time

00:21:02  
of initiation of investment there,

00:21:03  
is in compliance with the

00:21:05  
law of those State allegations

00:21:06  
by the hostess violations of

00:21:08  
its law on the course



00:21:09  
of the investment. As a

00:21:10  
justification for State action, with

00:21:12  
respect to the investment, might

00:21:14  
be a defense to claim

00:21:15  
substantive violations exist, but could

00:21:18  
not deprive. A tribunal acting

00:21:19  
under the authority of the

00:21:21  
treaty, B jurisdiction. In some

00:21:23  
cases, this has been taken

00:21:25  
Further Supply in circumstances where

00:21:27  
there is no specific language

00:21:28  
in the investment treaty to

00:21:30  
this effect. So for example,



00:21:31  
in Hollister Ghana which where

00:21:34  
it was found that investment

00:21:35  
will not be protected. If

00:21:36  
it has been created in

00:21:37  
violation of national International principles

00:21:39  
of good faith by with

00:21:40  
corruption fraud or deceitful conduct.

00:21:43  
And that there are general

00:21:45  
principles that exist independently of

00:21:47  
specific language to this effect

00:21:49  
in the treaty. So the

00:21:52  
second situation is going contemplated

00:21:54  
in front porch, Philippines case



00:21:55

where the investment has been

00:21:56

made, loftily. But supervening corruption

00:21:58

is subsequently occurred in yukos

00:22:01

Russia when considering allegations of

00:22:03

bad face and illegal conduct

00:22:05

against the investor. The tribunal

00:22:07

found that there was no

00:22:07

compelling reason to deny all

00:22:09

together, the right to invoke

00:22:11

the treats and investor was

00:22:12

breached the wall, the host

00:22:13

state. Following the Investments being

00:22:17

made its investor act illegally.



00:22:20

The hosted can in the

00:22:21

words of the tribunal requested

00:22:23

to correct Its Behavior. And

00:22:24

impose upon its sanctions available

00:22:26

under domestic law, but it

00:22:28

would undermine the purpose and

00:22:29

objectivity. CT, the Define to

00:22:31

deny, the investor the right

00:22:33

to make his case for

00:22:35

an arbitral tribunal. Based on

00:22:36

the same alleged violations, the

00:22:38

existence of which the investor

00:22:39

seeks to dispute on the



00:22:40

Merritt. So, in this situation

00:22:43

there for the corruption effects

00:22:44

of lovely establishment, vestment, it

00:22:46

would seem that the tribunal

00:22:47

needed less have jurisdiction of

00:22:49

the claim, and the consequences

00:22:50

of corruption are to be

00:22:51

dealt with at the merits

00:22:52

face. So once the approach

00:22:55

that I've just discussed has

00:22:56

been adopted by investment tribunals

00:22:58

based on some of a

00:23:00

strict interpretation quite often. The



00:23:02  
relevant investment treaty treating corruption

00:23:04  
exclusively as an issue of

00:23:05  
jurisdiction has raised concerns among

00:23:07  
some commentators for the following

00:23:09  
reasons. First, the question of

00:23:11  
a tribunal stress fiction is

00:23:12  
so they concerned with the

00:23:14  
adjudicative power that 5. You

00:23:15  
know this assessment seems unsuited

00:23:17  
for international policy such as

00:23:20  
corruption, s corruption that has

00:23:22  
occurred between an investor in

00:23:24  
a state does not automatically



00:23:25  
invalidate. The state's consents, arbitrate

00:23:27  
under the relevant investment treaty

00:23:29  
due to the doctrine of

00:23:30  
some cases such as flammable

00:23:32  
Gary support this approach. So,

00:23:35  
regardless of jurisdiction or ability,

00:23:42  
it almost always operates as

00:23:44  
an opposite bar to the

00:23:46  
proceedings. It's an investment is

00:23:48  
Tainted by corruption tribunal to

00:23:50  
be very unwilling to entertain

00:23:51  
the claims of investors on

00:23:52  
the merits of the case.



00:23:54

Regardless. So I'm not briefly

00:23:56

turn to how investors in

00:23:57

State's approach, the issue of

00:23:58

corruption differently in framing their

00:24:00

respective arguments in practice. It's

00:24:04

generally the advantageous for states

00:24:05

to start that investor is

00:24:07

engaged in Corrupt Practices for

00:24:08

jurisdictional reasons. But I've already

00:24:10

outlined seeing an example of

00:24:13

this, in the enforcement proceedings.

00:24:14

At the moment between p&id,

00:24:16

Nigeria, in that case, Nigeria



00:24:19

alleges that the investor obtain,

00:24:21

the underlined contract by bribing

00:24:23

Nigerian officials, not just that,

00:24:26

but that the investor also

00:24:27

subsequently bribe Nigeria's, legal counsel

00:24:29

to ensure that the country

00:24:30

would not contest the arbitration

00:24:31

vigorously. The award rendered amounted

00:24:34

to approximately 10 billion US

00:24:35

Dollars and if he's corruption

00:24:37

allegations are substantiated the challenge,

00:24:39

the award will likely succeed.

00:24:41

The shows the significant incentives



00:24:43

for states to substantiate the

00:24:44

corruption allegations against investors. Unclean

00:24:54

hands or as we just

00:24:56

discussed things investment was made

00:24:57

by the investor was not

00:24:59

made according to the laws

00:25:00

of the whole state. Alternatively,

00:25:02

this claim is inadmissible because

00:25:05

it is found on construction

00:25:06

and therefore contrary to International

00:25:08

public policy, and finally States

00:25:10

me also attempt to bring

00:25:12

counterclaims based on corruption against



00:25:14

investors of these are Franklin.

00:25:15

Likely to succeed for counterclaim

00:25:18

to be brought the claim

00:25:18

must be within the jurisdiction

00:25:19

of the tribunal or orbital

00:25:23

Center. Let's stay in the

00:25:23

case of excited and I

00:25:25

must arise directly out of

00:25:26

the subject matter of the

00:25:26

dispute. However, it's unlikely. The

00:25:29

founding jurisdiction for corruption, based

00:25:31

on counterclaim will run on

00:25:32

the same issues as the



00:25:33

primary claim brought by the

00:25:35

investor investment has been maybe

00:25:37

legally, there will be no

00:25:38

investment and the tribunal will

00:25:40

therefore have no jurisdiction to

00:25:41

hear the counter. As was

00:25:43

the case in the metal

00:25:44

test was as we discussed

00:25:45

in Metal Tech. The final

00:25:48

in circumstances, where state is

00:25:49

engaged in corruption. Investors may

00:25:51

claim a breach of the

00:25:52

fac standard by Me by



00:25:53

Example, particularly if they come

00:25:55

to, the tribunal has clean

00:25:56

hands, so to speak, not

00:25:57

engaged in the crop practice.

00:25:58

So, interesting. In EDF Romanian,

00:26:01

the tribunal agreed to a

00:26:02

request for a bribe by

00:26:03

state agencies in violation of

00:26:05

the ftt standard in circumstances,

00:26:07

where the investor who refused

00:26:08

to pay a bribe, your

00:26:09

contract extension soap. Just to

00:26:13

keep up with coming, to



00:26:14

get practice of sticking to

00:26:15

our time constraint. I'll briefly

00:26:17

conclude here, which is simply

00:26:19

to say that. I said

00:26:19

at the outset, the real

00:26:20

difficulty with corruption investment, treaty

00:26:23

claims that the state's participation

00:26:24

is implicit in the very

00:26:26

nature of corruption is the

00:26:27

policy dilemma at the heart

00:26:28

of it and frankly also

00:26:30

quite often the evidentiary one

00:26:31

which will be discussed by



00:26:33

Mike O'Connell. Thank you so

00:26:36

much. Glad that was extremely

00:26:38

helpful and I know her

00:26:40

Russian is such a big

00:26:41

topic and each of us

00:26:43

is challenged to address any

00:26:46

aspect of it in this

00:26:47

very short amount of time.

00:26:48

So thank you so much

00:26:49

for doing such an incredible

00:26:51

job of addressing those aspects.

00:26:53

I think I'd like to

00:26:54

hear from you and what



00:26:55

your thoughts are on the

00:26:57

legal aspects that who ledge

00:26:58

address. And I think, I

00:27:07

think you're still on mute.

00:27:10

Sorry, I was thinking to

00:27:11

myself what a time and

00:27:13

didn't ask, because Julian has

00:27:14

stopped the pain that everything

00:27:16

I have. So that can

00:27:17

be said, which means I

00:27:19

could focus on the points

00:27:21

of Discord. I'm so full

00:27:23

of discussion between a practitioners



00:27:25

and and Scholars. And there

00:27:27

is a general understanding that

00:27:30

when an investment and is

00:27:32

procured by corruption. We, we

00:27:36

end up with the tribes,

00:27:37

you know, not exercising a

00:27:38

jurisdiction. I'll give you this

00:27:40

can be by application of

00:27:43

the legality closer to be

00:27:44

80 in the picture because

00:27:47

there would be no investment

00:27:49

to protect that investment or

00:27:52

certain drivers have found in



00:27:54

the in the absence of

00:27:55

the claim will not be

00:28:00

admissible because of the principal

00:28:02

of public international law. Is

00:28:05

that like memo detour or

00:28:09

Clean Hands Doctrine? Or something

00:28:11

else. Breezy Oak View. Middle

00:28:15

schoolers Zachary. Douglas is one

00:28:18

of them saying that they

00:28:19

legality closing. Closing, vit was

00:28:22

not aimed at precluding situation,

00:28:25

whereby an investment. I have

00:28:27

procured by corruption the clothes



00:28:29

simply said, says to me

00:28:31

deals with the Purcell guide

00:28:33

of investment, for example, and

00:28:36

if the national law does

00:28:37

not allow an investment in

00:28:40

a specific industry because of

00:28:42

not like Colton to be

00:28:43

days or something like that.

00:28:44

This investment is not protected

00:28:46

by the b. I t.

00:28:47

It snow every kind of

00:28:49

significant legality or no significant.

00:28:52

The guy leads to a



00:28:54  
jurisdictional obstacle and the other

00:29:01  
elements that option. Which has

00:29:13  
taken place at some point

00:29:14  
in the life of the

00:29:16  
investment and notes. At the

00:29:18  
beginnings are all the stages

00:29:25  
of there is no clear

00:29:27  
Trend that different commercial knows.

00:29:29  
Different different National laws deal

00:29:31  
with the effects of corruption

00:29:34  
in different ways that are

00:29:37  
not under, which the contract

00:29:40  
would be considered as a



00:29:41

Benicio invalid. And a four

00:29:44

parties would be asked to

00:29:48

remember the other of everything

00:29:49

that they have received the

00:29:50

contracts and laws, that just

00:29:54

give the option to the

00:29:55

victim of the legality of

00:29:57

the correct option to decide

00:29:59

whether to execute the contract

00:30:00

or enforce it or two

00:30:03

to seek an annulment that

00:30:05

off at cetera. And it's

00:30:08

not certain that we have



00:30:10  
an international standard because if

00:30:12  
we can follow last number

00:30:13  
we applying us know when

00:30:15  
the dispute against the state

00:30:18  
or I'd held up a

00:30:19  
contract when it does not

00:30:20  
matter. I just out of

00:30:21  
a b, a t, it

00:30:22  
is a big discussion as

00:30:24  
to what should the driving

00:30:26  
I do? Should we focus

00:30:27  
on contributory and iPhones? And

00:30:29  
reduce damage, is to become



00:30:31

seed there than at the

00:30:33

contractual relationship is a relationship

00:30:35

and therefore sea or the

00:30:39

restitution. That is actually very

00:30:43

difficult in practice in such

00:30:45

situations. And the last point

00:30:47

I wanted to make it,

00:30:49

we can discuss further. And

00:30:52

is this is me the

00:30:55

exact point raised by the

00:31:00

ABS against Romania. Tribunal said

00:31:06

that, In order to base

00:31:09

a claim against the estate



00:31:10  
on the request of corruption

00:31:13  
by the state and its

00:31:15  
states seeking to be paid

00:31:16  
bribery. The investor has also

00:31:20  
proved that the state. So

00:31:23  
the bribery acting as some

00:31:25  
sort of official capacity, said

00:31:31  
they weren't against the same

00:31:35  
thing and and and this

00:31:37  
is a general, it is.

00:31:43  
It's an awfully difficult standards

00:31:46  
to apply the States official

00:31:50  
capacity is no corruption and



00:31:53  
if it does not equal

00:31:55  
to the stage which I

00:31:58  
kind of money invested between

00:31:59  
a rock and a hard

00:32:00  
place. And just so as

00:32:03  
to say that this kind

00:32:05  
of condition. Articles on the

00:32:08  
responsibility of states for international.

00:32:11  
Wrongful act, thank you so

00:32:20  
much are Tina. And I

00:32:21  
think so much of what

00:32:22  
we see is that there

00:32:23  
is such a difficulty in



00:32:25

proving corruption. And, and so,

00:32:28

so many of these questions

00:32:29

arise out of the fact

00:32:31

that the evidence is difficult

00:32:32

to find and and then

00:32:35

and difficult to present in

00:32:36

the arbitration contact. So I'd

00:32:38

like to go to Pedro

00:32:39

now because Pedro it has

00:32:41

a great benefit of being

00:32:44

a cross practice. Practitioner he

00:32:47

does both White Collar work

00:32:50

on corruption, investigations and international



00:32:52

arbitration. And Pedro is going

00:32:53

to talk to us, a

00:32:54

bit about how states do

00:32:56

substantiate their corruption allegations in

00:32:58

the criminal context, and especially

00:33:02

when those investigations are running

00:33:04

in parallel to International Airport.

00:33:06

What are some of the

00:33:08

aspects of the states actions?

00:33:11

Maybe? Thank, thank you rainbow

00:33:14

and and good morning. Good

00:33:15

afternoon, everybody first night, my

00:33:18

deep appreciation of the organizers



00:33:19  
for the invitation. It really

00:33:22  
is a pleasure to be

00:33:22  
here with these panels housekeeping

00:33:27  
and I are supposed to

00:33:28  
go without saying, but you

00:33:30  
know, I'm a lawyer. I'll

00:33:30  
say it. Anyway, I'm joining

00:33:33  
you guys today and speak

00:33:39  
for Gibson Dunn at B

00:33:40  
Printing client. Gets them done,

00:33:42  
but I did want to

00:33:43  
share some thoughts on a

00:33:44  
based on experience of different



00:33:47  
matters that that I've seen

00:33:48  
over the years. My my

00:33:51  
perspective is as rainbow was

00:33:53  
saying, an incoming into this.

00:33:55  
I worked on International arbitration,

00:33:57  
probably ten or twelve of

00:33:59  
them over the years. Best

00:34:00  
pieces. Behalf of claimants, and

00:34:03  
on behalf of sovereign states,

00:34:05  
and also commercial arbitration cases.

00:34:08  
But I think the more

00:34:10  
relevant part of my perspective

00:34:12  
is That is certainly your



00:34:14

last. I cannot really focused

00:34:16

on White Collar criminal defense

00:34:19

and that is primarily corruption

00:34:22

cases in in a couple

00:34:26

of dozen countries around the

00:34:27

world. So I I'm kind

00:34:28

of high team the scheme's.

00:34:30

I've seen the enforcement actions

00:34:32

by different governments and how

00:34:34

you actually get to prove.

00:34:35

Those cases of the pit

00:34:38

of my perspective on staying

00:34:40

in it. It may sound



00:34:41  
funny to say it is

00:34:44  
I think Russian is very

00:34:45  
easy to prove, you just

00:34:47  
need the right tools for

00:34:48  
it. And I think the

00:34:49  
challenges does international arbitration have

00:34:53  
those tools available in quite

00:34:56  
the same way that that

00:34:57  
the cases that I see

00:34:58  
on the other side of

00:34:59  
the Ledger, right? Criminal enforcement

00:35:01  
have them. I'm taking a

00:35:05  
step back in the modern



00:35:07

practice that we see in

00:35:09

the white collar bar. In

00:35:10

terms of corruption cases, it

00:35:13

has been tremendously Effective Government.

00:35:15

Didn't you all have seen

00:35:17

the headlines are our regularly

00:35:20

racking up. He'll hundreds of

00:35:22

millions if not billions plus

00:35:25

dollar penalties. In settling corruption

00:35:28

cases around the world challenges

00:35:32

that that a lot of

00:35:33

the things that work in

00:35:34

that context are not available



00:35:36

here, right? And I wanted

00:35:38

to share those things that

00:35:39

I did. I think it

00:35:40

worked. The first is it

00:35:42

if you take the top

00:35:43

10 enforcement matters for corruption

00:35:46

around the world and I

00:35:48

say this again from the

00:35:49

perspective of the US while

00:35:50

you're so focused primarily on

00:35:52

actions by the US Department

00:35:53

of Justice of the US

00:35:54

Securities and Exchange Commission. Those



00:35:57

cases go from like \$759

00:36:00

to 3 + billion dollars

00:36:02

in pounds. Every single one

00:36:05

of those cases, again talking

00:36:06

about the top 10, every

00:36:07

single one of those cases

00:36:08

has one thing in common,

00:36:09

which is the person that

00:36:10

use the end of the

00:36:11

accused of corruption has come

00:36:13

in and cooperate voluntarily. So

00:36:16

I'm getting all interior stays

00:36:17

a bit of a funny



00:36:18

turn right now, come in

00:36:20

and self-disclose the contact. But

00:36:22

when they've been approached by

00:36:23

the government, they've all cooperated

00:36:25

and cooperation mean, you are

00:36:28

normally when some of these

00:36:30

cases You are conducting their

00:36:32

own investigation, your training, over

00:36:33

your giving, the government presentations

00:36:35

of that investigation, you're off

00:36:37

in producing hundreds of thousands

00:36:38

of pages of documents to

00:36:40

the government. Showing the corruption,



00:36:42

you are sharing a train

00:36:44

work product. You are engaging

00:36:47

forensic, accountants that will analyze

00:36:50

transaction and then sharing the

00:36:52

results of that with the

00:36:53

government. So the government is

00:36:55

touting, all these cases that

00:36:56

it that is able to

00:36:57

resolve, but really, it's not

00:36:58

just unsure, investigative power. You

00:37:00

have the number one incentive

00:37:02

is Otherwise, defendants are coming

00:37:05

in and providing the information,



00:37:06  
obviously, that's not available in

00:37:09  
the context of international arbitration,

00:37:10  
another huge tool that isn't

00:37:12  
available in the show. The

00:37:16  
example, the US Securities and

00:37:19  
Exchange Commission will pay between

00:37:20  
10 and 30% of the

00:37:22  
amount that whistleblower of the

00:37:25  
scheme that whistle blower. Blow

00:37:26  
the whistle on the largest

00:37:28  
awarded is over a quarter

00:37:30  
billion dollars. That has been

00:37:32  
given to a whistleblower who



00:37:33

came and reported back to

00:37:34

the incentives. There are very

00:37:36

very different. I would also

00:37:39

note that is it in

00:37:40

the context of arbitration tribunals,

00:37:42

a lot of the criminal

00:37:45

tools that you would have

00:37:46

again setting aside, cooperation setting

00:37:49

aside, The Whistleblower just start

00:37:50

out right? Whether it's a

00:37:52

wiretap, whether it's a mutual

00:37:56

legal assistance request, right? So-called

00:37:58

emblems whether it's subpoena write,



00:38:01  
an arbitration tribunal isn't doing

00:38:02  
any of those things because

00:38:03  
I can't and so that

00:38:05  
is a huge challenge to

00:38:06  
how evidence can be gathered.

00:38:08  
But I wanted to touch

00:38:11  
on one wrinkle that I

00:38:12  
think is even more interesting,

00:38:13  
which is why we often

00:38:15  
talked about the claimants engaged

00:38:17  
in corrupt, right? If you

00:38:19  
bribe someone to get that,

00:38:20  
can bribe someone to get



00:38:22

that license or to get

00:38:23

that deal. I think the

00:38:25

image there is is relatively

00:38:28

clear for all of us

00:38:29

and our heads. But I

00:38:30

think a, a more difficult

00:38:32

scenario is perspective, is what

00:38:34

happens when the claimant is

00:38:35

alleging, that the state has

00:38:37

acted wrong because they're obviously

00:38:40

the state, the state has

00:38:41

some tools, and can rely

00:38:43

on his law enforcement, a



00:38:44  
attitude and wire, tap phones.

00:38:46  
If and pull account records

00:38:47  
at 10, go to bank,

00:38:49  
to get that information. Least

00:38:50  
domestically Clements don't have it.

00:38:53  
So I think a, a

00:38:54  
a a a huge challenge

00:38:56  
is what happens in a

00:38:58  
situation tonight. I seen it

00:39:00  
in some of my manners,

00:39:01  
we are the private. Claimant

00:39:02  
is affirming that the state

00:39:04  
has tried to extort them



00:39:06  
in some way in the

00:39:07  
claimant has refused right to

00:39:08  
vote. Bribery that the state

00:39:11  
has tried to extort him

00:39:12  
in some way and the

00:39:14  
challenges, you know, the claimant

00:39:15  
makes bile a local request

00:39:17  
for an investigation with the

00:39:18  
local authorities. But there is

00:39:20  
a perverse incentive for States,

00:39:22  
not to act on those

00:39:23  
investigations, not to find the

00:39:25  
wrongful conduct because if it



00:39:26

did, it would severely hurt

00:39:28

his chances in an arbitration

00:39:31

proceeding, There are other challenges

00:39:40

when it comes to evidence

00:39:41

that in the start of

00:39:43

the criminal enforcement world, we

00:39:44

see the first is that

00:39:46

over, 90% of the criminal

00:39:49

actions that have been resolved

00:39:51

in the US under the

00:39:52

foreign bribery laws have involved

00:39:54

misconduct by Third parties. In

00:39:56

other words, was in the



00:39:57

company necessarily, but they hired

00:39:59

a consultant that went out

00:40:00

and did the did the

00:40:01

deed, if you will, that

00:40:03

is obviously it's quite funny

00:40:06

challenging position for a tribunal

00:40:07

to be in because it's

00:40:09

not even the parties in

00:40:10

front of it, that are

00:40:11

necessarily going to have all

00:40:13

the evidence and documentation, but

00:40:14

rather you're getting into the

00:40:15

world of of third parties.



00:40:17

And I think frankly tribunals

00:40:19

have a very difficult and

00:40:21

there because it did was

00:40:22

very limited in what they

00:40:23

can. The other, and I'll

00:40:27

make it again in the

00:40:28

spirit of of of a

00:40:30

wrapping things up here. With

00:40:31

with time is there are

00:40:32

countries were this is a

00:40:33

lot harder to write. So

00:40:35

even if you have international

00:40:37

legal cooperation and by the



00:40:39

way, this happens all the

00:40:40

time that UK cooperate tremendously

00:40:43

with the US the French

00:40:44

authorities, a German authorities, the

00:40:46

Brazilian authorities are all very

00:40:47

good. I just want to

00:40:48

investigate these matters. Even if

00:40:52

you have that cooperation, your

00:40:53

other countries that are just

00:40:54

hard, right? Switzerland famously refused

00:40:57

for for forever to provide

00:40:59

banking records on account of

00:41:01

privacy, won't go get it.



00:41:03

The kind of thing that

00:41:03

makes finding corruption a lot

00:41:05

harder for chicorelli. If you're

00:41:07

an international tribunal, it doesn't

00:41:09

have these tool. The final

00:41:11

point, I'll make Injustice 2

00:41:12

in the spirit of a

00:41:13

thought discussion hearing. What do

00:41:16

you do in a case

00:41:17

in which 8A state with

00:41:21

access to, its resources, without

00:41:22

access to wiretap in Pinos

00:41:24

and bank records and everything.



00:41:25

At least within its own

00:41:26

jurisdiction claims that its found

00:41:29

that it has corruption and

00:41:30

sound corruption by the claimant,

00:41:32

and then swings and misses.

00:41:33

And I'm thinking of a

00:41:35

matter of where estate presented,

00:41:37

you know of wiretap records

00:41:41

and the wire kept records

00:41:42

in the oven. Should that

00:41:44

move the tribunal to say

00:41:45

look if if you come

00:41:47

in and you will let



00:41:48  
corruption and you swing and

00:41:50  
you miss, does that should

00:41:53  
that itself? A kind of

00:41:54  
move the needle from your

00:41:56  
perspective, really believe that option.

00:41:58  
That did or didn't happen

00:42:00  
without I apologize. Thank you

00:42:09  
so much, Pedro that was

00:42:10  
super interesting and I think

00:42:13  
extremely helpful to our audience

00:42:15  
because we don't get the

00:42:16  
opportunity to hear from people

00:42:18  
who are saying this from



00:42:19  
the criminal and Regulatory enforcement

00:42:21  
side are very regular basis.

00:42:23  
I'm glad I'd like to

00:42:25  
turn to you to hear

00:42:25  
what you have to say

00:42:27  
about Pedro's thoughts from the

00:42:29  
international arbitration perspective. Thank you.

00:42:33  
A thank-you. Pedro. I get

00:42:34  
to to Fox, come to

00:42:36  
mind. Having one of them

00:42:37  
as Pedro. Very clearly showed

00:42:40  
explored save the tools that

00:42:41  
are available in investigations are



00:42:43

proceeding, domestically in the US,

00:42:45

Senate in particular, and for

00:42:47

me, what sort of stood

00:42:48

out I guess is some

00:42:50

of the authorities or government

00:42:51

bodies? That he referred to

00:42:52

other estate deal J or

00:42:53

the SEC in this earth,

00:42:55

police powers that are available

00:42:56

to them for the purpose

00:42:57

of Investigation or collecting evidence.

00:42:59

And the fact that voluntary

00:43:02

cooperation accused out off, Matthew



00:43:04  
speaks to those Powers which

00:43:06  
can easily be replicated by

00:43:08  
International tribunals. The other point,

00:43:11  
which I think is wrong

00:43:12  
for throwing some attention to

00:43:13  
sort of the game player

00:43:14  
threshold issue around corruption allegations

00:43:17  
which is whether or not

00:43:18  
a state. For example, bring

00:43:20  
the defense it all before

00:43:22  
we even get the topic

00:43:23  
of evidence, right? And that

00:43:24  
it question itself is a



00:43:25

very complicated woman. What if

00:43:28

it's the the same Administration

00:43:30

that that accepted the bribe?

00:43:32

Bring it up as a

00:43:33

defense. What if it's a

00:43:35

different sort of government bodies,

00:43:37

12 actually defend the states

00:43:39

in the relevant proceedings? And

00:43:41

another one that was involved,

00:43:42

involved in the exception of

00:43:44

the investment itself. And so

00:43:46

a lot of these questions

00:43:47

do come up in in



00:43:48

the early stages and I'm

00:43:49

sure there are perhaps more

00:43:50

instances and investment for the

00:43:52

arbitration where corruption could be

00:43:54

raised as a valid defense.

00:43:55

Wear for one reason or

00:43:57

another out of expediency. It's

00:43:59

decided not to actually instead

00:44:01

of decisions made to bring

00:44:02

other jurisdiction. Objections, were objections,

00:44:04

based on on the Merritt.

00:44:06

So I thought I'd find

00:44:07

that. It's often complicated, Gateway



00:44:09

Worship with her not to

00:44:09

bring up the defense or

00:44:11

even bring for the evidence

00:44:13

SS bigger mentioned. There are

00:44:15

certain interested parties that might

00:44:17

affect the state's ability to

00:44:19

bring that forward. Thank you

00:44:26

so much for let that

00:44:27

sit. It's all very interesting

00:44:29

and Athena. I'm going to

00:44:30

go to you. Now, we

00:44:31

have touched on so many

00:44:33

different aspects of corruption claims



00:44:36  
today, from the differing standards

00:44:39  
of proof that have been

00:44:40  
applied to weather depending on

00:44:44  
the evidence and when the

00:44:45  
corrupt acts occurred, whether it

00:44:48  
is impact jurisdiction or the

00:44:50  
merits. And so I'd like

00:44:51  
to hear from you on

00:44:53  
the types of takeaways that

00:44:57  
we have what are the

00:44:58  
best practices that an arbitral

00:45:00  
tribunal can apply when they

00:45:03  
are addressing corruption claims. Thank



00:45:10

you. Thank you very much

00:45:11

rainbow for the question and

00:45:14

again, that are many aspects

00:45:24

of the arbitration. We look

00:45:25

at what is certain is

00:45:28

that arbitrators have to have

00:45:31

corruption somewhere in the back

00:45:32

of their minds and to

00:45:36

be aware of the evolving

00:45:37

standard as to what is

00:45:39

corruption. And of course, I

00:45:42

can grab some today. He's

00:45:45

a 14 in every place



00:45:47

globally to the difference between

00:45:57

Indio be in influence and

00:46:01

low beam which is relevant

00:46:03

for arbitrators to to, to

00:46:04

know. Just just remember to

00:46:07

give her that we are

00:46:08

discussing about. We haven't African

00:46:10

Focus today that the Africans

00:46:13

Union convention on preventing and

00:46:15

combating Corruption. It has been

00:46:18

ratified by practically. I have

00:46:21

a totality of African States.

00:46:26

Another another point that tribunal



00:46:32

should I take into account

00:46:34

is not, there is a

00:46:36

shape of their, their, their,

00:46:38

their RB convention but also

00:46:43

there are my checklist by

00:46:45

several institutions to ask the

00:46:48

red flags as to what

00:46:49

they drive. You know what

00:46:50

what foods raise the eyebrows

00:46:54

overdrive. You know what I

00:46:55

should bring their bathing suits,

00:46:57

is there to the fact

00:46:58

that there may be some



00:47:00

photo of some sort of

00:47:01

Corruption of troll times in

00:47:03

the case and there are

00:47:08

very few checklists corruption there

00:47:16

is a very famous Lord

00:47:18

rules for a report on

00:47:20

business ethics and the base

00:47:22

that used to choose on

00:47:23

Governors have also provided a

00:47:25

cute turkey for You traitors

00:47:27

with such a red flag

00:47:28

list and Barbie at the

00:47:31

same time, count that red



00:47:35

flags have being developed in

00:47:38

the account and do the

00:47:41

regions and, and processes that

00:47:43

Enterprises in action in order

00:47:48

to combat corruption. They, they

00:47:50

do not necessarily to burden

00:47:58

of proof and proven corruption.

00:47:59

And, and there's something that

00:48:01

is not worth cuz I

00:48:02

wanted to race with you.

00:48:03

Is that regards to something?

00:48:07

That is a red flag,

00:48:08

a decision of a state



00:48:09  
to ground a conversation with

00:48:11  
outside proceeding through a rebuilding

00:48:13  
process. We have no thingy

00:48:19  
that has a red flag

00:48:20  
but deciding differently in the

00:48:23  
Bowl against turn to low

00:48:24  
2022. Decision in the court

00:48:29  
of appeal of Paris used

00:48:31  
it. As a red flag,

00:48:32  
supporting the timing of corruption

00:48:34  
in the Congo against the

00:48:38  
cast of Psych on site

00:48:39  
on CJ's, or in the



00:48:41  
guinea against global voice. Okay.

00:48:43  
So it's a red flag

00:48:45  
but it's not a proof

00:48:47  
on its own and in

00:48:49  
another point, but it is

00:48:50  
very relevant, is that sometimes

00:48:52  
we see used in arbitration,

00:48:55  
as a red flag, the

00:48:57  
fact that the accounting equation

00:48:59  
has every option index. And

00:49:04  
again, this is fine as

00:49:05  
a red flag. When what

00:49:07  
is at stake is the



00:49:08  
process that the Enterprise would

00:49:09  
put forwards to do to

00:49:11  
fight corruption, but when an

00:49:14  
arbitrator uses it as a

00:49:16  
red flag for corruption, the

00:49:18  
line between using a red

00:49:20  
flag and just being biased

00:49:22  
is everything in my Mind

00:49:27  
if we have time the

00:49:35  
question as to whether the

00:49:38  
Tribune is under a beauty

00:49:39  
to investigate corruption and whether

00:49:42  
the tribunal has the means



00:49:43  
to investigate corruption will allow

00:49:46  
me a couple of minutes

00:49:47  
to, to deal with with

00:49:49  
me to draw the basic

00:49:53  
Airlines of discussion. Because, again,

00:49:54  
there's a lot to be

00:49:55  
said, but as we already

00:49:57  
discussed in this panel, The

00:50:00  
duty to fight corruption is

00:50:02  
considered to be part of

00:50:03  
public policy today and also

00:50:08  
form part of the arbitrator's

00:50:09  
duty to ensure the enforceability



00:50:12  
of the award. But what

00:50:15  
can I do to do?

00:50:16  
And what can an arbitrator

00:50:17  
don't in order to investigate

00:50:18  
corruption is a big discussion

00:50:20  
and and of course Pedro

00:50:21  
has already passed upon and

00:50:25  
but it is to think,

00:50:30  
in terms of the two

00:50:32  
main a diverging approaches also

00:50:36  
to the tribunal has ruled

00:50:38  
in contacting the proceedings. And

00:50:41  
there is no inquisitorial approach



00:50:43

and the adversarial approach we've

00:50:48

been crazy. Toriel approach that

00:50:50

we seen very many civil

00:50:51

law system. For example, of

00:50:53

the arbitrator is very actively

00:50:56

involved in investigating. The facts

00:51:00

of the case and therefore

00:51:02

investigate factual elements on their

00:51:07

own initiative. All the other

00:51:12

hands made me. Come on

00:51:13

low countries. Mostly adversarial approach,

00:51:19

which focuses on the party

00:51:22

autonomy. And According to, which



00:51:25

the parties are the players

00:51:27

who should bring their in

00:51:30

the necessary evidence. What's a

00:51:33

dragon I can do or

00:51:34

cannot do is also a

00:51:35

matter of who we be

00:51:38

the jobs, controlling the decision

00:51:39

of the tribunal. If the

00:51:41

controlling jobs for nose anniversary

00:51:43

approach, the tribunal has some

00:51:47

possibility to investigate corruption at

00:51:50

least one party has a

00:51:52

large states and enter for



00:51:54

the RAV4 and see if

00:51:57

I can take play with

00:52:02

the evidential burden of proof

00:52:05

Etc. Is the inquisitorial approach.

00:52:16

Is there any way that

00:52:17

the arbitrator has is much?

00:52:20

Wider is a 30-ton on

00:52:23

their own account, but raised

00:52:26

questions of corruption and ask

00:52:28

the parties to discuss days

00:52:30

in the proceedings. And possibly

00:52:32

as a steak on the

00:52:33

stove and enclosing and following



00:52:41

up on what Calum has

00:52:42

eyes of the very beginning.

00:52:43

Today. What the french judge

00:52:45

asks from the arbitrator's is

00:52:48

exactly to take such a

00:52:49

very active approach. When I

00:52:51

went to see the obituaries

00:52:52

in France and when the

00:52:54

French John will be the

00:52:56

control judge of the arbitration

00:52:58

award. Thank you so much.

00:53:02

I think I think those

00:53:03

are those are very good



00:53:05  
pointers for arbitrators. And also

00:53:07  
some very tricky questions that

00:53:10  
we are all struggling with

00:53:12  
that. As we look at

00:53:14  
issues of corruption, tell him,

00:53:15  
I'd like to go to

00:53:16  
you because you started out

00:53:17  
by introducing us to some

00:53:19  
of what has happened in

00:53:20  
the French courts over the

00:53:21  
past year. And I'd like

00:53:23  
to hear what you think

00:53:24  
about what Athena has just



00:53:26

talked about. In terms of,

00:53:27

you know what weather going

00:53:29

to control court is going

00:53:31

to end. How control courts

00:53:33

have acted in particular for

00:53:35

arbitration, seated in France and

00:53:37

how that may impact our

00:53:39

virtual practice. I mean, I

00:53:43

agree with what I have

00:53:45

to say. I've been thinking

00:53:47

about the different standards that

00:53:50

you would apply depending on

00:53:51

your feet, right? And if



00:53:52

you were lucky enough, but

00:53:55

I'm going to have a

00:53:56

seat seated in Paris. You

00:53:58

have more power, inquisitorius Powers

00:54:00

available to you. Even if

00:54:01

you come from a coma

00:54:02

background versus, if you were,

00:54:04

you asked where you were?

00:54:06

So it makes me a

00:54:17

bit nervous. I don't disagree,

00:54:19

but I bet it has

00:54:20

that. It's part of the

00:54:21

calculus and we have to



00:54:22

be, we have to know

00:54:23

what's happening in France was

00:54:24

interesting, the French ports, frame

00:54:25

it. As a matter of

00:54:27

not, not reviewing the merits

00:54:30

of the underlying award, but

00:54:32

but just reviewing the Conformity

00:54:34

of the Year Award with

00:54:35

fresh public policy and international

00:54:37

principles. So it's not that.

00:54:40

There's no Essential at that.

00:54:42

It's not really about the

00:54:43

merits but it's about conforming



00:54:45

to the public policy principles

00:54:47

of the system in which

00:54:48

that award exist. But are

00:55:04

what's happening in that jurisdiction

00:55:06

where you sit just a

00:55:09

logical conclusion, makes me a

00:55:10

bit nervous or there wouldn't

00:55:11

be uniform standard and perhaps

00:55:12

that's part of what the

00:55:13

recommendation of approach for tracking

00:55:18

knows that transcends Civil War

00:55:21

on, you know, whether any

00:55:34

of this has to Review



00:55:41  
corruption evidence, particularly post-award, corruption

00:55:44  
evidence. So I'll leave it

00:55:47  
at that. I would just

00:55:47  
make one quick, it's on

00:55:49  
the right side is evolving

00:55:53  
in the context of that

00:55:55  
was something that we we

00:55:56  
found interesting. And in writing

00:55:58  
this paper, on the illegality

00:55:59  
of which was everything short

00:56:01  
of corruption where you, you

00:56:03  
see, there are cases where

00:56:05  
the due diligence standard to,



00:56:08

which the investor is held,

00:56:09

very spry. There's a strict

00:56:11

liability kind of standard to

00:56:12

use your help to you.

00:56:15

You were supposed to have

00:56:16

done your due diligence and

00:56:17

somehow, you were also due

00:56:19

to make any investment. Well,

00:56:20

that's too bad. You're, you're

00:56:21

strictly liable anyway and then

00:56:22

and others will have a

00:56:27

very quiet and we'll kind

00:56:30

of way it and besides



00:56:31

well, you know, you didn't

00:56:33

know if you didn't do

00:56:33

enough, you know, you saw

00:56:35

this one was, you didn't

00:56:36

see this and then some

00:56:40

Cases that says, it doesn't

00:56:42

even look at it, just

00:56:54

come back in the context

00:56:56

of the effects of the

00:57:06

French. The very recent friend

00:57:10

should approach the court, the

00:57:13

court of appeal to hear

00:57:17

for the first time allegations



00:57:19  
of corruption and, and, and

00:57:20  
the investigate these allegations, for

00:57:23  
the first time allegations that

00:57:24  
have not been heard from

00:57:25  
the tribunal, I taste of

00:57:29  
Killeen mentioned, is highly criticized

00:57:40  
Alex has been her usual.

00:57:47  
Pedro. What are your thoughts

00:57:48  
on these issues from the

00:57:50  
world of criminal and Regulatory

00:57:52  
enforcement. There was one in

00:58:01  
particular that, that really recorded

00:58:04  
me, which is your reference



00:58:05  
to print sample. The corruption

00:58:07  
perception index has the so-called

00:58:09  
CPI than any rate of

00:58:11  
deck since it's a very

00:58:12  
thoughtful word product from Transparency,

00:58:14  
International repeated organization and and

00:58:19  
I completely get my the

00:58:20  
Hardy right. It I think

00:58:22  
it provides invaluable context but

00:58:25  
it can also become kind

00:58:27  
of a ritual of prejudice

00:58:28  
or biased. You say well

00:58:29  
you know I'm lazy to



00:58:32

say well, look investment in

00:58:33

country X automatically must be

00:58:36

tainted by Copying setting in

00:58:38

our kind of criminal enforcement

00:58:39

practice it isn't an important

00:58:41

tool reference. I have sat

00:58:45

across the table from the

00:58:46

justice department on countless occasions

00:58:47

and the discussion is off

00:58:50

and well, you know, hold

00:58:51

on. You said your clients

00:58:52

did this level of diligence

00:58:55

on your third party, but



00:58:57  
they're operating in this market,

00:58:58  
you know, this Market is

00:58:59  
riskier, right? And so there

00:59:01  
is a certain element where

00:59:02  
I get the popped up

00:59:04  
the possibility that its use

00:59:06  
them properly or as a

00:59:07  
lazy short cord or something.

00:59:08  
But it's also a reality

00:59:09  
of the world. Almost feels

00:59:12  
like to borrow the US,

00:59:14  
the legal standard of willful

00:59:16  
blindness, right? It almost feels



00:59:17

like willfully blind of an

00:59:19

arbitrator, not to take into

00:59:21

account. That there are certain

00:59:23

markets where unfortunately, no corruption

00:59:26

is Joe institutionalized that it,

00:59:28

it feels to me like

00:59:29

that they should take into

00:59:31

account. That is an investment

00:59:33

in X sector in X

00:59:35

country. Should We get a

00:59:37

closer look as to whether

00:59:39

everything was done a bunk

00:59:40

board or not I get



00:59:41

that it's a very hard

00:59:43

issue but I think that

00:59:45

you identified as an exceptionally

00:59:48

helpful tool that arbitrators could

00:59:49

use as a as a

00:59:51

reference. Not a decisive issue

00:59:53

but a reference the only

00:59:55

other come grab my mobile

01:00:02

device us. Aggressive lawyer. I

01:00:05

need to be more aggressive

01:00:08

in in asking pointed questions

01:00:11

and connecting the dots. I

01:00:13

think often times it in



01:00:15  
my experience and, and I'm

01:00:16  
I'm know, I'm no expert

01:00:18  
on arbitration, but in my

01:00:19  
experience, arbitrators are happy to

01:00:21  
be briefed on issues. They

01:00:23  
are happy to get the

01:00:24  
mission from the parties. They're

01:00:25  
very deferential to giving both

01:00:27  
parties a chance to be

01:00:28  
heard and all that. But

01:00:30  
they don't often ask they're

01:00:31  
really harder questions of connecting

01:00:33  
the dots. You, no matter



01:00:35

comes to mind where there

01:00:37

are several government officials that

01:00:39

are now under arrest and

01:00:41

they're under arrest in a

01:00:42

fact pattern that is strikingly

01:00:44

similar to what the claimants

01:00:46

have raised. And I would

01:00:48

love to see the arbitrator

01:00:49

sit down and and just

01:00:51

say to that particular respondent.

01:00:53

Help me out here. You

01:00:55

know, you say there's no

01:00:56

corruption but this person is



01:00:57  
under arrest. This person is

01:00:58  
under arrest as persons under

01:00:59  
arrest, and it took to

01:01:02  
give it my us raise.

01:01:03  
Make it make sense for

01:01:04  
me, and putting putting parties,

01:01:07  
whether it's a claimin, ora,

01:01:08  
Ora, Ora Ora, Ora, explain

01:01:15  
it. I think is a,

01:01:18  
is a, you know, I

01:01:20  
think that's a better approach

01:01:21  
until I would, I would

01:01:22  
encourage her to borrow the



01:01:25

old phrase, connect the dots

01:01:26

to 210. Do that exercise,

01:01:28

not just sit back and

01:01:29

wait for some Olivia cross

01:01:31

examination results. Were they stay

01:01:33

naked make sense because I'm

01:01:35

seeing all these red flags

01:01:36

and I want you guys

01:01:37

to answer it directly for

01:01:39

me. Yeah, that's a very

01:01:44

interesting point and we are

01:01:45

at we are doing extremely

01:01:46

well on time. We do



01:01:47  
have some questions from the

01:01:49  
audience, but picking up and

01:01:51  
let Pedro just said, I'd

01:01:52  
like to pose a question

01:01:53  
to Google add. Before I

01:01:54  
turn to the questions from

01:01:56  
the audience, which is what

01:01:57  
do you do when you

01:02:00  
have a situation? Like, the

01:02:01  
one that Pedro has just

01:02:02  
described or the one that

01:02:04  
Athena opposed, which is neither

01:02:06  
party is raising the claim



01:02:09  
of corruption. But you have

01:02:11  
either a situation where the

01:02:15  
the officials involved in the

01:02:17  
investment have all been arrested

01:02:19  
in another corruption scheme. Suggesting

01:02:22  
that maybe there was corruption

01:02:23  
in this investment as well.

01:02:25  
Or you simply have nothing

01:02:27  
more than the corruption index.

01:02:30  
Suggesting that corruption could be

01:02:32  
present, but neither party is

01:02:34  
Raising it. They, they seem

01:02:35  
to want to avoid it



01:02:36  
in the arbitration. So glad

01:02:38  
what, what do you think

01:02:39  
is the right thing to

01:02:40  
do in that situation? Yeah,

01:02:42  
I mean I just one

01:02:44  
quick when I get something

01:02:45  
on the index itself, I

01:02:46  
think Pedro put it well

01:02:47  
that it makes sense to

01:02:49  
look at it as part

01:02:50  
of a multifactorial tester assessment

01:02:52  
and as a Theater award

01:02:53  
it's not it shouldn't be



01:02:55

decisive on on on the

01:02:56

given matter in terms of

01:02:58

how you would proceed in

01:02:59

circumstances where neither party has

01:03:03

raised allegations of corruption. I

01:03:06

think that ultimately will turn

01:03:07

on but on the tribunal

01:03:08

so you don't have to

01:03:10

be satisfied of their own

01:03:11

jurisdiction in proceedings. If they

01:03:14

have good reasons to believe

01:03:15

that there was a risk

01:03:16

of corruption at the time



01:03:18  
of investment and therefore they

01:03:20  
may not have jurisdiction over

01:03:21  
the relevant dispute. They should

01:03:24  
have their own initiation look

01:03:25  
into the matter and raised

01:03:26  
the matter because it's simply

01:03:28  
not feasible for me to

01:03:30  
turn their eyes away from

01:03:32  
the possibility that they don't

01:03:33  
have jurisdiction over a given

01:03:34  
dispute. I mean, I think

01:03:36  
that's that's sort of, where

01:03:37  
is Pedro? Mentioned some of



01:03:39

the new courage for a

01:03:42

given treadmill, really hasta to

01:03:43

come up? And I know

01:03:45

that. Unfortunately speaking frankly can

01:03:47

be a bit complicated sometimes

01:03:49

where we have a system

01:03:50

that's dependent on repeat appointments

01:03:53

and so therefore you don't

01:03:54

always you know you fine

01:03:55

or betray his maybe in

01:03:56

certain circumstances hesitant to shake

01:03:58

the tree a little bit.

01:03:59

You can imagine this is



01:04:01  
probably one of the arguments

01:04:01  
that people make for more

01:04:03  
permanent eye institution to assess

01:04:05  
investment treaty claims but but

01:04:08  
I think it's absolutely fundamental

01:04:09  
that that's looked into Inception.

01:04:13  
Yeah, that's very true and

01:04:16  
I'm going to pose another

01:04:17  
question for anyone who wants

01:04:19  
to answer it, which is

01:04:20  
in, what do you do

01:04:21  
when there is evidence of

01:04:23  
corruption? That was not at



01:04:25

the outset, but let you

01:04:27

know, but has arisen during

01:04:28

the course of the investment

01:04:30

is that a red flag?

01:04:32

That investment that corruption could

01:04:34

have occurred also at the

01:04:35

outset or how, how else

01:04:37

might that impact the investment

01:04:39

in an arbitration. And then

01:04:41

also what we have seen,

01:04:43

tribunal's like the one in

01:04:45

petrobranga where they found that

01:04:48

if Brian has been paid



01:04:49  
at the outside of the

01:04:50  
investment but that no benefit

01:04:52  
had had inured to the

01:04:56  
investor and as a result

01:04:57  
they determined that they did

01:04:59  
have jurisdiction on. So I

01:05:01  
guess my question to the

01:05:03  
panelists know what what do

01:05:05  
you do in those situations

01:05:06  
that based on the most

01:05:08  
recent developments that we've seen

01:05:09  
and in France and otherwise

01:05:15  
If I may have just



01:05:16  
come in on the last

01:05:17  
one because it doesn't Echo

01:05:19  
what what we saw and

01:05:20  
Emma versus Croatia, which is

01:05:22  
this having to link from

01:05:25  
you propose to bribe? You

01:05:29  
investor bribed ex-official successfully in

01:05:33  
order to get in return.

01:05:34  
A benefit wish you didn't

01:05:35  
receive because of the narrative

01:05:38  
and so I could see

01:05:41  
if you followed that kind

01:05:43  
of height and standard and



01:05:45

Analysis saying well you didn't

01:05:47

actually you're successful and your

01:05:49

bribe. So there is there's

01:05:51

no completion of the she

01:05:56

followed that line of thinking

01:05:57

and there's no there's no

01:06:01

but I know that's right,

01:06:04

we can debate that but

01:06:06

it certainly sounded to me

01:06:07

a lot like this heightened

01:06:09

causal cause a causal link

01:06:11

chain. If I can just

01:06:16

offer a brief comments on



01:06:18  
that one lawyer happier on.

01:06:23  
But under us law particular

01:06:25  
Foreign Corrupt Practices Act which

01:06:27  
is the law that governs

01:06:28  
bribery of non US government

01:06:30  
officials and offer or a

01:06:32  
promise to pay whether or

01:06:33  
not he pain. Is, is

01:06:35  
considered by a payment, an

01:06:37  
author of promise to pay

01:06:38  
whether or not you receive

01:06:39  
what you bargained for is

01:06:42  
still write under us walk.



01:06:43

So I think it is

01:06:45

again for my, for my

01:06:46

option, practitioner perspective, anti-corruption anti-corruption

01:06:52

practitioner perspective, if you go

01:06:55

to and you promised that

01:06:57

someone will approach a public

01:07:04

procurement officer at Ministry of

01:07:06

whatever and say, if you

01:07:07

get me this contract, I

01:07:08

will get you X. If

01:07:10

I'm awarded I'll cut your

01:07:11

back, 10%. Got me a

01:07:14

promise or offer that you



01:07:15  
will pay in the event

01:07:17  
that you're actually granted. That

01:07:18  
contract is a bright. So

01:07:20  
that's different. Perhaps and in

01:07:23  
the arbitration you were the

01:07:24  
one on the US perspective.

01:07:28  
Comments on recent case, but

01:07:41  
he's applying the standard. That's

01:07:44  
a very old standard kind

01:07:45  
of. All right. Listen to

01:07:46  
tell me my we visit

01:07:48  
very, very high standard for

01:07:50  
finding corruption. We no longer



01:07:55  
receiving. I'm in the truck

01:07:58  
now, seek more to to

01:08:00  
investigate there. The cases and

01:08:02  
exactly the other point is

01:08:03  
that if we we searched

01:08:05  
to find, always a causal

01:08:06  
link between everything, and we

01:08:10  
just don't follow the definition

01:08:11  
of corruption as it appears

01:08:14  
today in international conventions and

01:08:16  
another instruments. Yeah, I think

01:08:22  
that's exactly, right. And this

01:08:23  
also, we had a question



01:08:25  
from the audience about whether

01:08:27  
non-financial benefits given to government

01:08:31  
officials, could constitute corruption and

01:08:35  
international arbitration. And I think

01:08:36  
everything we just discussed really

01:08:38  
responds to that. I'm going

01:08:40  
to go now to a

01:08:41  
another question that we have

01:08:43  
from the audience which is

01:08:44  
if the corrupt acts has

01:08:45  
taken place outside of the

01:08:47  
host 8eg payments into offshore

01:08:49  
accounts, would there be any



01:08:51

impact on the applicable law

01:08:53

to determine if corruption occurred

01:08:55

and would host state laws?

01:08:57

Must be relevant and so

01:08:59

maybe pay through. I see

01:09:01

if not, I'm going to

01:09:01

go to you first from

01:09:02

the criminal perspective because I

01:09:03

think the answer is probably

01:09:06

similar, but somewhat with 70

01:09:09

wants, two differences between the

01:09:11

two areas of law. Would

01:09:21

look at it more. As



01:09:22  
was, it was it a

01:09:23  
corrupt back in relation to

01:09:25  
the investigation right often times

01:09:27  
by definition, it will be

01:09:28  
an offshore act because it's

01:09:30  
moving money offshore and stuff.

01:09:32  
From a different perspective, frankly

01:09:35  
are our friends of the

01:09:35  
justice department are quite creative

01:09:38  
in finding a way to

01:09:39  
say that. It was an

01:09:40  
act that touch the us,

01:09:41  
whether it was a transaction



01:09:42  
into bank accounts and happened

01:09:44  
to be denominated in US

01:09:45  
dollars or that went through

01:09:47  
a server in the US,

01:09:48  
the jurisdiction part from a

01:09:50  
criminal perspective almost becomes easier,

01:09:53  
but I think it would

01:09:57  
be is it or corruption

01:09:59  
or this kind of money

01:10:00  
laundering stores in rubber case,

01:10:01  
maybe that is a wedge

01:10:02  
in relation to the investment

01:10:04  
at the issue. And I



01:10:05

think if, if the answer

01:10:06

is yes, then again, my

01:10:09

own ignorance. Barbra Streisand. I

01:10:10

don't I don't see how

01:10:11

that would necessarily change the

01:10:13

count. This much. Yeah, I

01:10:17

mean I just from my

01:10:18

perspective, I guess there is

01:10:20

there's the whole state law

01:10:22

requirements. Most instances we mention

01:10:25

of some Modern crushin walls

01:10:27

will have some extra territory

01:10:29

affect, right? So for example,



01:10:31  
under the UK bribery act

01:10:33  
bribery or corruption, that takes

01:10:37  
place by anyone linked to

01:10:38  
the UK, whether it's a

01:10:39  
resident or national, and it's

01:10:40  
against their foreign officials will

01:10:42  
be captured as well. Because

01:10:44  
naturally, these schemes are organized

01:10:46  
and in very convoluted and

01:10:48  
Austin extraterritorial manner. But even

01:10:52  
let's say for a moment

01:10:53  
that the relevance of local

01:10:55  
laws and regulations, don't capture



01:10:57

such conduct. As I mentioned

01:11:00

earlier, it's not simply in

01:11:01

cases where has been required

01:11:03

to comply with local laws

01:11:04

and regulations that crushes down

01:11:06

to deprive? The tribunal of

01:11:08

of jurisdiction there is also

01:11:09

a Reliance on more general

01:11:11

principles of good faith in

01:11:13

otherwise. So it hasn't always

01:11:15

been the case that has

01:11:15

been reliance. Express treaty language.

01:11:18

So that would certainly cut



01:11:19  
across it as well. That

01:11:25  
makes sense that we have

01:11:26  
a comment about the fact

01:11:29  
that there's not a widely

01:11:30  
accepted definition of corruption and

01:11:32  
international treaties. I think maybe

01:11:34  
I'd like to go to

01:11:35  
you because you spoke a

01:11:36  
little bit about where tribunal's

01:11:38  
may look to find both

01:11:40  
guidance on the definition of

01:11:43  
corruption and on red flags,

01:11:46  
you know what, where do



01:11:48  
you think tribunal should look

01:11:49  
for this definition? And is

01:11:50  
there, is there a good

01:11:51  
definition that works across International

01:11:54  
arbitration and in particular across

01:11:56  
investment arbitration? You're assuming I

01:12:00  
hadn't eaten in the question

01:12:07  
as to what no reply

01:12:10  
to the existence of notes

01:12:12  
of corruption. Is not linked

01:12:17  
with necessarily with the whole

01:12:19  
states. L, o, i mean

01:12:21  
that provides us together as



01:12:30  
to what is the corruption

01:12:31  
and can you connect to

01:12:32  
National instruments? Instruments, be signing

01:12:44  
corruption themselves. But don't play

01:12:46  
instruments. Providing assistance to arbitrators

01:12:50  
and and, and empathy sand

01:12:54  
companies with regard to what

01:12:56  
kind of practices are to

01:12:58  
be considered as Corrupt Practices.

01:12:59  
I don't think that an

01:13:00  
arbitrator specifically refer 21 convention

01:13:03  
would rather that she or

01:13:06  
he would rather look at



01:13:08  
more than one instruments in

01:13:10  
that regard. Yeah but I

01:13:14  
think that's right I mean

01:13:15  
there isn't it's going to

01:13:17  
depend on the treaty that

01:13:18  
is governing the dispute as

01:13:20  
well as many other factors

01:13:22  
what a tribunal is going

01:13:24  
to look at in that

01:13:24  
situation. And if anyone else

01:13:26  
wants to add anything on

01:13:27  
that but otherwise I think

01:13:28  
we have made very good



01:13:30  
time here today. So let

01:13:33  
me just see the do

01:13:34  
any of the coke analysts

01:13:36  
have anything they'd like to

01:13:37  
add. You're hearing nothing and

01:13:42  
seeing, No Hands. Thank you

01:13:44  
so much to everyone for

01:13:46  
your time today. And for

01:13:48  
joining us, it's been super

01:13:50  
interesting and engaging. I think

01:13:51  
one of the recurring themes

01:13:53  
that we heard throughout this

01:13:55  
morning, / afternoon, slash evening



01:13:58  
panel, depending on where you

01:14:00  
are, is that this is

01:14:01  
such a huge topic with

01:14:03  
so many different aspects to

01:14:05  
be discussed and with cross

01:14:07  
over to other areas of

01:14:08  
law and it's very difficult

01:14:10  
to address everything comprehensively in

01:14:14  
an hour and 15 minutes.

01:14:16  
So we are very happy

01:14:17  
to be joining all of

01:14:19  
our. All of the people

01:14:21  
who have joined us today



01:14:22

and our breakout rooms for

01:14:24

another short discussion of corruption.

01:14:26

But of course, this is

01:14:29

a discussion that could continue

01:14:30

all day long and for

01:14:32

the rest of the week

01:14:32

and we still probably would

01:14:34

not have covered it, but

01:14:35

thank you so much and

01:14:36

thank you again to Jose

01:14:38

Antonio and Ian and Tamara.

01:14:40

Lucia, who has been very

01:14:41

helpful in collecting all of



01:14:43  
the questions and dealing with

01:14:45  
all of the technology during

01:14:46  
this time, Thank you very

01:14:49  
much, a rainbow and thank

01:14:51  
you very much to Colleen

01:14:52  
and Athena Pedro. And thank

01:14:57  
you so much because this,

01:14:59  
this, this has been sort

01:15:01  
of an exemplary panel and

01:15:03  
in both the substance and

01:15:04  
format and timing show. No,

01:15:07  
kudos to everyone of you,

01:15:08  
I believe that you have



01:15:11  
done an incredible job. I

01:15:13  
I would like to to

01:15:14  
put this as an example

01:15:15  
of a great panel in

01:15:16  
terms of of the presentation

01:15:19  
initially Which Wich did an

01:15:23  
update of what has been

01:15:24  
going on in the past

01:15:25  
year and then the various

01:15:27  
issues on on corruption the

01:15:31  
relation with with the the

01:15:33  
requirement to comply with applicable

01:15:36  
or than issues, with respect



01:15:39  
to public policy, International public

01:15:41  
policy and and and and

01:15:42  
good faith Etc and and

01:15:44  
then the standard of proof

01:15:47  
and then from a The

01:15:48  
perspective that perhaps in a

01:15:51  
corruption might need a more

01:15:52  
active or or connecting the

01:15:56  
dots by the arbitrator's suggestion.

01:15:59  
So thank you so much.

01:16:01  
Now it may be time

01:16:03  
to move on to the

01:16:04  
breakout rooms, we have time



01:16:07  
to do that. We would

01:16:08  
love you to stay on

01:16:10  
for those that may be

01:16:11  
interested. And Matt Lucia will

01:16:13  
send us to the breakout

01:16:14  
rooms and then there's no

01:16:16  
obligation to talk about anything

01:16:19  
substantive in the breakout rooms.

01:16:21  
We offer that space because,

01:16:23  
of course, we are in

01:16:25  
the world and people are

01:16:26  
maybe not freak on me,

01:16:27  
being in the states, that



01:16:28  
maybe number in the Americas

01:16:30  
except Carmen Asia. And I

01:16:31  
need to wait to connect

01:16:32  
with the with the rest

01:16:34  
of the world. So thank

01:16:35  
you. And let's take it

01:16:36  
away from for the, for

01:16:38  
the breakroom. Thank you. And

01:16:51  
thank you, Raymond for moderating.

01:16:53  
It was up timely tight

01:16:55  
ship. Thank you. I didn't

01:16:59  
mean to cut anyone off

01:17:00  
you.